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APPENDIX

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JOHN F. DAVIS, CL

Supreme Court of the United States

October Term, ~~1968~~ 1969

No. ~~976~~ 41

THE CHOCTOW NATION AND THE CHICKASAW NATION,
Petitioners,

v.

STATE OF OKLAHOMA, ET AL.,
Respondents.

No. ~~1104~~ 59

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,
Petitioner,

v.

STATE OF OKLAHOMA, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI IN NO. ~~976~~ 41 FILED JANUARY 25, 1969
PETITION FOR CERTIORARI IN NO. ~~1104~~ 59 FILED MARCH 3, 1969
CERTIORARI GRANTED APRIL 21, 1969

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Order Granting Stay of
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[Filed December 9, 1966]

IN THE UNITED STATES COURT IN AND FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil No. 6219

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,

Plaintiff,

v.

STATE OF OKLAHOMA; COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; CITIES SERVICE OIL CO.; CONTINENTAL OIL CO.; EASON OIL CO.; STEVE GOSE; JAKE L. HAMON; HUMBLE OIL AND REFINING CO.; JEFFREY SAND AND GRAVEL CO.; LONE STAR PRODUCTION CO.; MARATHON OIL CO.; MOBIL OIL CORPORATION; PAN AMERICAN PETROLEUM CORPORATION; SKELLY OIL CO.; SOUTHLAND ROYALTY CO.; STEPHENS PRODUCTION CO.; SUN OIL CO.; TENNECO OIL CO.; UNION OIL CO. OF CALIFORNIA; AND YAHOLA SAND AND GRAVEL CO., A CORPORATION,

Defendants.

COMPLAINT

I.

Jurisdiction of this Court is invoked under Section 18, Paragraph 2 of the Act of April 26, 1906, (34 Stat. 137). 318 U.S. 629, 640.

II.

This action will involve the construction, interpretation and application of the Constitution of the United States, Article II, Section I, Amendments V and XIV, Section I; Cherokee Treaty of Washington, D.C., May 6, 1828, Articles II, III, 7 Stat. 311, 2 Kapp. 288; Act of May 28, 1830, 4 Stat 411; Cherokee Treaty of Ft. Gibson, February 14, 1833, Article I, 7 Stat. 414, 2 Kapp. 385; Cherokee Treaty of New Echota, Cherokee Nation east, December 29, 1835, Articles II, III, V, and VI, 7 Stat. 478, 2 Kapp. 439; Cherokee Treaty of Washington, D.C., July 19, 1866, Articles XI, XIV, XV, XVI, XVII, XX, XXII, XXIII, XXVI, XXVII, and XXXI, 14 Stat 799; Choctaw Treaty of Doak's Stand, October 18, 1820, Articles II and III, 7 Stat. 210; Choctaw Treaty of Washington, D.C., January 20, 1825, Preamble and Articles I and II, 7 Stat. 234; Choctaw Treaty of Dancing Rabbit Creek, Article II and XI, September 22, 1830, 7 Stat. 333; Choctaw and Chickasaw Treaty of Washington, D. C., June 22, 1855; Act of May 2, 1890, Section 31, 26 Stat 81; Act of July 1, 1902, Section 64, 32 Stat. 716; Act of April 26, 1906, Sections 11, 17, 18, 27 and 28, 34 Stat 137; Act of June 16, 1906, Section I, 34 Stat. 267; Constitution of the State of Oklahoma, Article I, Section 3; Article II, Section 7, adopted in Convention at Guthrie, July 16, 1907, ratified September 17, 1907, put in force November 16, 1907.

III.

The Cherokee Nation from December 29, 1835 to April 26, 1906, was the absolute fee title owner of certain lands hereinafter more particularly described within the present State of Oklahoma and commonly referred to as the bed and banks of the navigable portion of the Arkansas river within said State; that is to say that part of the bed and banks of said river lying below

the mean level of the high water mark upon said banks, from a point on said river in present Muskogee County, Oklahoma, beginning at the confluence of Grand river with said Arkansas river, downstream to the confluence of the Canadian river, and to the north bank thereof, and thence down said Arkansas river along the center of its main channel to the State line of Arkansas; that said fee title of said Cherokee Nation was derived as follows:

In accordance with the desire of the United States, as expressed in the following preamble of the Treaty of May 6, 1828, between the Western Cherokees and the United States (7 Stat. 311, 2 Kapp. 288):

> "WHEREAS, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, a permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *"

the Cherokee Nation exchanged its aboriginal domain in the east for a domain west of the Mississippi River, located in what was then known as Indian Territory, now constituting a part of the State of Oklahoma; and the United States agreed to issue a patent to the Cherokee Nation for said western domain embodying the above quoted guarantee (Treaty of May 6, 1828, Arts. 2,

3, 7 Stat. 311, 2 Kapp. 288; Act of May 28, 1830, 4 Stat. 411; Treaty of February 14, 1833, Art. 1, 7 Stat. 414, 2 Kapp. 385; Treaty of December 29, 1835, Arts. 2, 3, 5, 6, 7 Stat. 478, 2 Kapp. 439.)

IV.

On December 31, 1838, a patent was duly issued and recorded in the General Land Office conveying to the Cherokee Nation certain tracts of land therein set forth, containing in all 14,374,135.14 acres. The patent states in its preamble that the conveyance is made by the United States in consideration of the promises contained in said Cherokee Treaties of 1828, 1833 and 1835, and further provides:

> "And Whereas, the United States have caused the said tract of seven millions of acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows:
>
> "Beginning at a mound of rocks four feet square at base and four and a half feet high, from which another mound of rocks bears South one chain, and another mound of rocks bears West one chain, on what has been denominated the old western territorial line of Arkansas Territory; twenty five miles north of Arkansas river; thence South twenty one miles and twenty eight chains, to a post on the north east bank of the Verdigris river, from which a hackberry, fifteen inches diameter, bears South sixty one degrees thirty one minutes East, forty three links, marked C.H.L. and a Cotton wood forty two inches diameter bears South twenty one degrees fifteen minutes, east fifty links marked C.R.K.L.; thence down the Verdigris river, on the Northeast bank, with its meanders, to the junction of Verdigris and Arkansas river, thence from the lower bank of Verdigris river, on the north bank of Arkansas

river, South forty four degrees, thirteen minutes, East fifty seven chains, to a post on the south bank of Arkansas, opposite the eastern bank of Neosho river, at its junction with Arkansas, from which a red oak, thirty six inches diameter, bears South seventy five degrees, forty five minutes West, twenty four links and a hickory, twenty four inches diameter, bears South eighty nine degrees East, four links; thence South fifty three degrees west, one mile to a post, from which a rock bears North fifty three degrees East, fifty links and a rock bears South eighteen degrees, eighteen minutes west fifty links; thence South eighteen degrees, eighteen minutes West thirty three miles twenty eight chains and eighty links, to a rock, from which, another rock bears North, eighteen degrees, eighteen minutes east fifty links and another rock bears South fifty links; thence South four miles, to a post on the lower bank of the North fork of Canadian river, at its junction with Canadian river, from which a Cotton wood, twenty four inches diameter, bears north eighteen degrees East, forty links, and a Cotton wood, fifteen inches diameter bears South nine degrees East fourteen links; thence down the Canadian river, on its north bank, to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the South bank of Arkansas river four chains and fifty four links, East of Fort Smith; thence north seven degrees, twenty five minutes west, with the Western boundary of the State of Arkansas, seventy six miles, sixty four chains and fifty links to the South west corner of the State of Missouri; thence North, on the Western boundary of the State of Missouri, eight miles, forty nine chains and fifty links, to the north bank of Cowskin or Seneca river at a mound

six feet square at base, and five feet high, in which is a post marked on the South side, Cor. n. Ch. L. d; thence west on the southern boundary of the lands of the Senecas, eleven miles and forty eight chains to a post on the east bank of Neosho river, from which a maple, eighteen inches in diameter, bears South thirty one degrees East, seventy two links; thence up Neosho river, with its meanders, on the east bank, to the southern boundary of Osage lands, thirty six chains and fifty links west of the South east corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of Neosho river; thence west on the southern boundary of the Osage lands; to the line dividing the territory of the United States from that of Mexico, two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square at base, and five and a half feet high, in which is deposited a cylinder of charcoal, twelve inches long and four inches diameter; thence South along the line of the territory of the United States and Mexico, sixty miles and twelve chains, to a mound of earth six feet square at base and five and a half feet high, in which is deposited cylinder of charcoal, eighteen inches long and three inches diameter; thence East, along the northern boundary of Creek lands, two hundred and seventy three miles fifty five chains and sixty six links to the beginning, containing within the survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.

"And Whereas, the United States have also caused the said tract of eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof to be as follows:

Beginning at South east corner of Osage lands, described by a rock from which a red oak, twenty inches diameter bears South twenty seven degrees East seventy six links, and a burr oak, thirty inches diameter, bears South fifty nine degrees West one chain; and another burr oak, thirty inches diameter, bears North eight degrees west, one chain and thirty seven links; and another burr oak forty inches diameter bears north thirty degrees west, one chain, and eighty one links, and running east twenty five miles to a rock on the western line of the State of Missouri, from which a post-oak, ten inches diameter, bears North forty eight degrees, thirty minutes east, four chains; and a post oak, twelve inches diameter, bears South sixty two degrees, East five chains; thence North, with the western boundary of the State of Missouri, fifty miles, to a mound of earth five feet square at base and four and a half feet high; thence West twenty five miles to the North east corner of the lands of the Osages, described by a mound of earth six feet square at the base and five feet high; thence South along the Eastern boundary of Osage lands, fifty miles, to the beginning: containing eight hundred thousand acres.

"Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted and by these presents do give and grant unto the said Cherokee Nation, the two tracts of land so surveyed, and hereinbefore described, containing in the whole, Fourteen Millions, three hundred and seventy four thousand one hundred and thirty five acres, and fourteen hundredths of an acre: To have and to hold the same, together with all the rights, privileges and appurtenances thereunto belonging to the said Cherokee Nation forever, subject however, to the right of the United States to permit other tribes of

red men to get salt on the salt plain on the western prairie, referred to in the Second Article of the treaty of the twenty ninth of December, one thousand eight hundred and thirty five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article; and subject also to all the other rights reserved to the United States, in and by the article herein before recited, to the extent and in the manner, in which the said rights are so reserved; and subject also to the condition provided by the Act of Congress of the twenty eighth of May, one thousand eight hundred and thirty; referred to in the above recited third Article, and which condition is, that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct or abandons the same."

V.

Included in the 13,574,135.14 acre tract granted in the above patent, in fee simple, to the Cherokee Nation, and located in present Oklahoma, were the riverbed lands described herein above which form the subject matter of this suit. As originally surveyed in 1837, by United States Surveyors, there was no distinction or division line made between the Cherokee Outlet lands and the Cherokee home tract; the area was surveyed as one tract, and the whole tract of 13,574,135.14 in present Oklahoma was marked on the original plat as, "Cherokee Lands", and patented to the Cherokee Nation accordingly.

VI.

That on April 26, 1906, pursuant to the provisions of Section 27 of an Act of Congress of that date (34 Stat. 137), fee title to the said river bed lands described

herein, "as lands belonging to the Cherokee Tribe", passed to and became vested in the United States of America in Trust for the use and benefit of the members of said Cherokee Nation or Tribe, and their respective heirs, and that said Trust title exists today undiminished and unextinguished; that over the years since 1906 the Defendants, State of Oklahoma and the Commissioners of the Land Office, in violation of the provisions of Section I of the Act of June 16, 1906 (the Enabling Act, 34 Stat. 267) have collected large sums of money from various persons, firms and corporations, as bonuses, rentals and royalties, under terms of certain purported contracts or leases covering portions of said described river bed, the exact amount of which is unknown to the said Cherokee Nation or Tribe of Indians; that said monies as thus collected belong to said Nation or to its Guardian and Trustee, the United States, for the use and benefit of the members of said Nation, as above set out.

VII.

That said purported leases and contracts covering said portions of said river bed have all been entered into by various persons, firms and corporations mistakenly and innocently in apparent reliance upon the force and effect of certain decisions of the Supreme Court of Oklahoma, and by reason of the circumstances, and in good conscience and equity, the Cherokee Nation or Tribe believes that it is only entitled to (1) recover from the State of Oklahoma and the Commissioners of the Land Office judgment for all monies heretofore by them so collected, and (2) to an order compelling said State and said Land Office to forthwith pay to the United States of America, for the use of said Cherokee Nation or Tribe of Indians, all monies derived from said leases which said defendants now hold and have not otherwise expended, and (3) judgment against the said corporate and other defendants requiring them to pay all future royalties

derived from their respective leases to the United States of America as Trustee for said Cherokee Nation or Tribe of Indians, and (4) an order restraining each and every defendant from interfering in any manner or form after final judgment herein with the rights of either the United States or the said Cherokee Nation or Tribe of Indians in their peaceful possession and lawful use of the said property.

WHEREFORE, Plaintiff prays for Judgment against said defendant, the State of Oklahoma and the Defendant, The Commissioners of the Land Office, for an accounting of all monies said defendants have derived from any purported lease covering any portion of the bed and banks of said Arkansas river as described herein, and for an order decreeing to said Plaintiff lawful ownership of all monies derived from said lease or leases, and directing said defendants to pay said monies to the United States of America in Trust for said Plaintiff; and for further order and judgment against the corporate and other defendants named in the caption hereof, requiring each of them hereafter to account to the United States of America as Trustee for the Cherokee Tribe all future rentals or royalties due under the terms of any existing contracts or leases; and for further order restraining each and all of the Defendants from interfering in any manner or form with the right of either the United States of America or of the Cherokee Nation or Tribe in and to the lawful use of said river bed, and for all costs expended herein, together with reasonable attorneys fee and all other equitable relief.

/s/ Earl Boyd Pierce, ATTORNEY
FOR CHEROKEE NATION OR TRIBE
OF INDIANS OF OKLAHOMA
1008 Barnes Building
Muskogee, Oklahoma

OF COUNSEL:

ANDREW C. WILCOXEN
Muskogee, Oklahoma

[Filed December 23, 1966]

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes SOUTHLAND ROYALTY COMPANY, one of the Defendants in the above styled and numbered cause, hereinafter called Defendant, and files this its original answer in response to Plaintiff's Original Complaint and for such answer would respectfully show the Court as follows:

1.

Defendant is without sufficient information to either admit or deny the allegations as contained in Paragraphs I through VII of Plaintiff's Original Complaint as filed herein.

WHEREFORE, premises considered, Defendant prays that Plaintiff take nothing by this suit and that costs be assessed against Plaintiff.

* * * * *

CROSS-COMPLAINT

Comes now SOUTHLAND ROYALTY COMPANY and files this its cross-complaint against the STATE OF OKLAHOMA and the COMMISSIONERS OF THE LAND OFFICE OF AND FOR THE STATE OF OKLAHOMA, two of the named Defendants in the above styled and numbered cause and for such cross-complaint would show the following:

1.

This Cross-Complaint is asserted against the STATE OF OKLAHOMA and the COMMISSIONERS OF THE LAND OFFICE OF AND FOR THE STATE OF OKLAHOMA, two of the Defendants in the action asserted by Plaintiff herein and the Court has jurisdiction over the parties and the Cross-Complaint to the same extent as such is applicable to the cause of action asserted by Plaintiff herein.

2.

The STATE OF OKLAHOMA and the COMMISSIONERS OF THE LAND OFFICE OF AND FOR THE STATE OF OKLAHOMA have, expressly and/or by implication, represented and warranted to SOUTHLAND ROYALTY COMPANY that such leasehold or other interest acquired by said company from said Cross-Defendants and which are the subject matter of the cause of action herein sued upon were owned by the STATE OF OKLAHOMA and subject to conveyance, transfer and assignment free of encumbrances and any other claims of any title or interest therein by any and all third parties. Cross-Complainant would further show that said Cross-Defendants are liable to SOUTHLAND ROYALTY COMPANY for all losses, damages and expenses which may be incurred or sustained by reason of the cause asserted by Plaintiff herein and accordingly SOUTHLAND ROYALTY COMPANY is entitled to indemnity for any and all of the same.

WHEREFORE, SOUTHLAND ROYALTY COMPANY prays for judgment over against Co-Defendants and Cross-Defendants herein, the STATE OF OKLAHOMA and the COMMISSIONERS OF THE LAND OFFICE OF AND FOR THE STATE OF OKLAHOMA, for any and all losses, damages and expenses incurred or sustained by SOUTHLAND ROYALTY COMPANY growing out of or

pertaining to the cause as asserted by Plaintiff herein which in any way may be sustained or incurred by the said SOUTHLAND ROYALTY COMPANY.

Respectfully submitted,

HUDSON, KELTNER, SMITH & CUNNINGHAM

By /s/ Dale B. Hinson
1905 Continental Life Building
Fort Worth, Texas

ATTORNEYS FOR SOUTHLAND ROYALTY COMPANY

[Certificate]

[Filed December 30, 1966]

ANSWER OF DEFENDANT, YAHOLA SAND AND GRAVEL COMPANY, A CORPORATION

1.

The Defendant, for answer to the complaint of the Plaintiff filed herein, states that it is without knowledge as to the matters and things set out in Section I through V of said complaint, and, therefore, neither admits nor denies such allegations.

2.

With respect to the allegations of Sections VI and VII of the Plaintiff's complaint, this Defendant states that it is without knowledge as to the questions of title set forth therein or the right of the Plaintiff to recover from the State of Oklahoma.

This Defendant admits that it is the owner and holder of two leases from The State of Oklahoma, acting through the Commissioners of the Land Office, which involve lands within the bed of the Arkansas River in the area involved in this cause and admits that it has paid rentals and royalties with respect thereto to the Commissioners of the Land Office of Oklahoma. Said leases were by it entered into in good faith and the payments made thereunder were paid to the Commissioners of the Land Office of Oklahoma in good faith. This Defendant has expended large sums of money in developing or preparing to develop said leases and said leases should be by this Court held to be valid and subsisting leases, subject only to the payment to the proper person or persons of the rentals and royalties due thereunder. Copies of said leases are attached hereto as Exhibit "A" and Exhibit "B".

This Defendant further states that it will pay all rentals and royalties due pursuant to said leases during the pendency of this cause into the Registry of this Court and will abide by such judgment as this Court may render with respect to the person or persons to whom said rentals and royalties should be paid during the period of said leases.

WHEREFORE, this Defendant prays that this Court do enter its decree finding said leases above referred to to be valid and existing leases and that this defendant be entitled to all the benefits thereof for the period of said leases, subject only to the payment to such person or persons as this Court may direct of the rentals and royalties due thereunder, and that during the period of the pendency of this cause that this Defendant be authorized and directed to pay such rentals and royalties as may become due under said leases into the Registry of this Court to be paid over to the person or persons found by this Court entitled thereto and that this Court

further find that all previous payments of rentals and royalties as due have been made by this Defendant and that this Defendant be relieved of any further liability with regard thereto.

FITE, ROBINSON & SUMMERS

By /s/ Julian B. Fite
Attorneys for Defendant,
Yahola Sand & Gravel
Company

STATE OF OKLAHOMA
COUNTY OF MUSKOGEE

William Dills, upon oath being first duly sworn, states that he is the Vice -President of Yahola Sand and Gravel Company, Defendant herein, and makes this affidavit on behalf of said Defendant; he states that he has read the within and foregoing Answer and the matters and things therein set forth are true.

/s/ William Dills

Subscribed and sworn to before me this 29th day of December, 1966.

/s/ Elizabeth Vogel
Notary Public

My commission expires
July 29, 1970

EXHIBIT A

SAND AND/OR GRAVEL LEASE CONTRACT

KNOW ALL MEN BY THESE PRESENTS:

THIS INDENTURE, made and entered into this the 2nd day of June, 1964 by and between the Commissioners of the Land Office of the State of Oklahoma, for and on behalf of the State of Oklahoma, hereinafter designated as the party of the first part, and Yahola Sand and Gravel Company, a corporation, 326 Merchants National Bank Building, Fort Smith, Arkansas, authorized to do business in the State of Oklahoma, designated as party of the second part:

WITNESSETH: That in consideration of the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, the receipt of which is hereby acknowledged, additional consideration, covenants and conditions hereafter set forth, the party of the first part hereby grants and conveys unto the party of the second part, the right and privilege to remove not to exceed one hundred twenty-five thousand (125,000) cubic yards of sand and/or gravel from that part or portion of the bed of the Arkansas River in the following Sections:

> Sections 3, 4, 5, 6, 7, 8, 18, 19 and 30 in Township 10 North, Range 27 East; and Sections 22, 27, 31, 32, 33 and 34 in Township 11 North, Range 27 East; and Sections 12, 13, 14 and 24 in Township 10 North, Range 26 East, situate in LeFlore and/or Sequoyah Counties, Oklahoma,

with the specific understanding that if not more than one hundred twenty-five thousand (125,000) cubic yards of sand and/or gravel is removed, no refund of any part or portion of said remittance will be made. The party of the second part is hereby granted the right and privilege

to remove any amount of such materials in excess of one hundred twenty-five thousand (125,000) cubic yards with the specific understanding that additional consideration at the rate of five cents (.05) per cubic yard must be paid for all materials removed in excess of one hundred twenty-five thousand (125,000) cubic yards.

This contract is for a period of five (5) years from and after July 14th, 1964, and is subject to the rights of the United States Government, Easements, Leases, or any other rights in, upon, over or across said premises now outstanding in third parties, if any, and the covenants, conditions and obligations hereinafter set forth.

1. It is agreed that the *party of the second part shall commence operation to* remove sand and/or gravel from the premises above described within one year from date hereof and shall keep a daily record of all sand and/or gravel removed from said premises and shall *file a written notice and report with the party of the first part* at its office in the State Capitol in Oklahoma City, Oklahoma, *each thirty (30) day period, beginning thirty days (30) after the date of this contract, giving the total number of cubic yards of sand and/or gravel removed during the immediately preceding thirty (30) days period,* and after one hundred twenty-five thousand (125,000) cubic yards of such materials has been removed from said premises, a remittance for any excess materials removed within the thirty (30) day periods must accompany the notice and report.

2. It is agreed and understood that party of the first part, its representatives or agents, shall be allowed to enter upon and into any part of the premises for the purpose of inspection, and that they shall have access, at reasonable times and places, to the books and records of party of the second part, showing the amounts of sand and/or gravel removed from the premises, for auditing purposes.

3. It is agreed and understood that party of the second part shall operate all workings upon the premises in a workmanlike manner, and that it will hold party of the first part harmless from any and all claims which might arise from the operations under this contract, and that at the expiration of this contract, or the prior termination thereof, it will remove from the premises all machinery, dredges, boats, pipes, piers, buildings and all other appliances, equipment or devices erected upon the premises or used in connection with the operations under this contract, and it shall promptly surrender and return the premises to party of the first part, or to whomsoever as shall be legally entitled thereto.

4. It is agreed and understood that party of the second part shall use the premises only for the purpose herein specified, and that party of the second part shall not cause or permit any nuisance to be maintained upon the premises.

5. It is agreed and understood that party of the second part shall not install, maintain or operate any device which will interfere with navigation upon said Arkansas River without prior approval from the duly constituted authorities.

6. It is agreed and understood that party of the second part shall be liable to the riparian owners adjacent to the premises included within this contract, for any and all damages or losses which may accrue to such adjacent riparian owners by reason of the removal of sand and/or gravel from the premises, and in the event of such loss or damage, if the party of the second part and such riparian owner or owners adjacent to the premises cannot agree upon the amount of such damages the same shall be determined in the manner now provided, or which may hereafter be provided by the laws of the State of Oklahoma. Party of the second part agrees to pay all such damages so determined within ten (10) days

after the final determination thereof, and the amount of such damages may be recovered from the party of the second part or the surety upon its bond given to secure the faithful performance of the covenants, conditions and agreements contained in this contract.

7. It is agreed and understood that no assignment, sale or transfer of this contract, or any part thereof, whether by act of the parties or by operation of law, shall be valid or convey to and vest in the assignee, transferee or purchaser, any right, title, interest, equity or estate in or to the premises, unless such assignment, transfer or sale shall first be approved in writing by party of the first part, and a copy of the assignment, transfer, bill of sale, or other written evidence thereof, be filed in the office of the party of the first part; and any such transferee, assignee or purchaser, if approved by party of the first part, shall furnish a bond to the satisfaction of party of the first part, conditioned for the faithful performance of the terms, covenants and conditions of this contract, and the payment of such transfer fee as may be required by the rules and regulations of the party of the first part.

8. It is agreed and understood that before this contract shall be of any force and effect, party of the second part shall give a good and sufficient bond in the penal sum of One Thousand ($1,000.00) Dollars, conditioned for the faithful performance of the terms, covenants and conditions of this contract by party of the second part, such bond to be approved by party of the first part.

9. It is agreed and understood that all machinery, tools, equipment, engines, dredges, boats, piers, and all other property used by party of the second part to remove sand and/or gravel from the premises shall remain the property of party of the second part, and the same

may be removed from the premises at any time prior to the termination of this contract, provided, however, that party of the first part shall have a lien upon all such equipment, and upon all sand and/or gravel in excess of one hundred twenty-five thousand (125,000) cubic yards, which has been removed from the premises but not sold, wherever located, for any and all sums which are or may be due to party of the first part from party of the second part, and any encumbrances placed upon such equipment shall be subject to and inferior to the prior lien thereon held by party of the first part.

10. It is agreed and understood that this contract grants unto party of the second part the right to remove only sand and/or gravel from the premises, and that party of the second part shall not knowingly remove from the premises any gold, silver, cinnabar, lead, zinc, tin, copper, nickel, asphalt, coal gypsum, glass sand, saline deposits, precious stones, or any material which may be the source of fissionable materials, or other valuable deposits, in commercial quantities.

11. It is agreed and understood that the terms, covenants, conditions and obligations contained in this contract shall be binding upon the successors or assigns of the parties, and that upon the violation or breach of any of them or the laws of the State of Oklahoma, relating to public lands, party of the first part shall have the right to revoke and cancel this contract, upon 30 days written notice of cancellation to party of the second part at its office and place of business in Fort Smith, Arkansas, or any other office it may maintain.

12. It is agreed and understood that at the expiration of the term of this contract, should party of the second part desire to obtain an extension or renewal thereof, and should party of the first part desire to lease or let the premises for the purpose of removal of sand and/or gravel therefrom, said party of the second part

shall have the right to, and receive, all rights or privileges usually extended to preference right lessees by party of the first part, in the renewal or extension of surface leases, upon such terms and conditions, and for such rental as may be fixed by party of the first part or their successors, either at public or private sale.

IN WITNESS WHEREOF the Commissioners of the Land Office of the State of Oklahoma, for and on behalf of the State of Oklahoma, have caused these presents to be executed by their Vice Chairman and attested by their Secretary, on the date first above written, and Yahola Sand and Gravel Company, a corporation, has caused these presents to be executed by its Vice Chairman and attested by its Secretary.

THE COMMISSIONERS OF THE LAND OFFICE
OF THE STATE OF OKLAHOMA

By James M. Bullord
Vice Chairman
PARTY OF THE FIRST PART

ATTEST:
Sue Hays
Secretary

YAHOLA SAND AND GRAVEL COMPANY

By /s/ William Dills
Vice President
PARTY OF THE SECOND PART

ATTEST:
Beulah K. Dills
Secretary

STATE OF OKLAHOMA
COUNTY OF MUSKOGEE

Before me, the undersigned, a Notary Public, in and for the State of Oklahoma on this 2nd day of June, 1964, personally appeared William Dills to me known to be the identical person who subscribed the name of the maker hereof to the foregoing instrument as its Vice President, and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Witness my hand and official seal the day and year 1st above written.

Elizabeth Vogel
Notary Public

My Commission Expires:
January 24, 1966

AMENDMENT TO
SAND AND/OR GRAVEL LEASE CONTRACT
DATED JUNE 2, 1969

Easement No. 3968

Lease No. CS-5410
Easement No. 3730

KNOW ALL MEN BY THESE PRESENTS:

In consideration of the sum of Fifty ($50.00) Dollars, the receipt of which is hereby acknowledged, and for

good cause shown, the Commissioners of the Land Office of the State of Oklahoma hereby amend covenant No. 1 of page 1 of Sand and/or Gravel Lease Contract dated June 2, 1964, by and between the Commissioners of the Land Office of the State of Oklahoma for and on behalf of the State of Oklahoma, party of the first part, and Yahola Sand and Gravel Company, a corporation, party of the second part, to extend the period of time within which to commence operation to remove sand and/or gravel from that part or portion of the bed of the Arkansas River in the following sections:

> Sections 3, 4, 5, 6, 7, 8, 18, 19 and 30 in Township 10 North, Range 27 East; and Sections 22, 27, 31, 32, 33 and 34, in Township 11 North, Range 27 East; and Sections 12, 13, 14 and 24 in Township 10 North, Range 26 East, situate in LeFlore and/or Sequoyah Counties, Oklahoma,

to February 15, 1967.

It is agreed and understood that this Amendment shall in no wise affect any of the other covenants, conditions and obligations set forth in said Sand and/or Gravel Lease Contract and that this Amendment shall be binding upon the successors or assigns of the parties to said contract, and that upon the violation or breach of any provision of said contract as amended the party of the first part shall have the right to revoke and cancel said contract upon thirty (30) days written notice of the cancellation to the party of the second part at its office and place of business in Fort Smith, Arkansas, or any other office it may maintain.

IN WITNESS WHEREOF the said parties have caused their signatures to be subscribed hereto this 8th day of February, 1966.

COMMISSIONERS OF THE LAND OFFICE
STATE OF OKLAHOMA

By /s/ James M. Bullard
Vice Chairman
PARTY OF THE FIRST PART

ATTEST:
Sue Hays
Secretary

YAHOLA SAND AND GRAVEL COMPANY

By /s/ R. W. Dills
President
PARTY OF THE SECOND PARTY

ATTEST:
Winifred Reitz
Asst. Secretary

THE COMMISSIONERS OF THE LAND OFFICE,
Oklahoma City, Okla.

Date: February 8, 1966

[Permanent Fund]
Acknowledges Receipt of
$50.00 **Applied as Follows**

Loan No. _____

Sales No. _____

Consideration for
an Amendment $50.00

Lease No. CS-5410

County LeFlore &/or Sequoyah

Consideration for an Amendment to Sand and/or Gravel Lease Contract dated June 2, 1964, Easement No. 3730, covering certain parts or portions of the bed of the Arkansas River.

[Yahola Sand and Gravel Company
326 Merchants National Bank Bldg.
Fort Smith, Arkansas]

[Amendment filed on Easement No. 3968 and attached to Easement No. 3730]

MISCELLANEOUS RECEIPT

Rem. # 7309 (Ck. # 10323)

[Paid February 9, 1966
Commissioners of Land Office]

THE COMMISSIONERS OF THE LAND OFFICE,
Oklahoma City, Okla.

Date 5/13/1964

Acknowledges Receipt of
$6,250.00 Applied as Follows

Loan No. _____

Sales No. _____

Lease No. CS 5410

County _____

ESCROW $6,250.00

(Pending Issuance of Lease Contract for removal of sand and/or gravel from bed of Arkansas River in every section in 10 & 11 N, 26 & 27E)

[Yahola Sand And Gravel
Company
326 Merchants Natl Bank Bldg.
Fort Smith, Arkansas 72901] 1369

MISCELLANEOUS RECEIPT

[Paid May 13, 1964
Commissioners of the
LAND OFFICE
Oklahoma]

EXHIBIT "B"

SAND AND/OR GRAVEL LEASE CONTRACT

Lease No. CS-5412
Easm. No. 3744

KNOW ALL MEN BY THESE PRESENTS:

THIS INDENTURE, made and entered into this the 28th day of July, 1964 by and between the Commissioners of the Land Office of the State of Oklahoma, for and on behalf of the State of Oklahoma, hereinafter designated as the party of the first part, and Yahola Sand and Gravel Company, a corporation, 326 Merchants National Bank Building, Fort Smith, Arkansas, authorized to do business in the State of Oklahoma, designated as party of the second part:

WITNESSETH: That in consideration of the sum of One Thousand ($1,000.00) Dollars, the receipt of which is hereby acknowledged, additional consideration, covenants and conditions hereafter set forth, the party of the first part hereby grants and conveys unto the party of the second part, the non-exclusive right and privilege to remove not to exceed twenty thousand (20,000) cubic yards of sand and/or gravel from that part or portion of the bed of the Arkansas River to the following Sections:

> 33 and 34 in Township 12 North, Range 21 East, situate in Muskogee and Sequoyah Counties, Oklahoma,

with the specific understanding that if not more than twenty thousand (20,000) cubic yards of sand and/or gravel is removed, no refund of any part or portion of said remittance will be made. The party of the second part is hereby granted the right and privilege to remove any amount of such materials in excess of twenty thou-

sand (20,000) cubic yards with the specific understanding that additional consideration at the rate of five cents (.05) per cubic yard must be paid for all materials removed in excess of twenty thousand (20,000) cubic yards.

This contract is for a period of four years from and after July 28th, 1964, and is subject to the rights of the United States Government, Easements, Leases, or any other rights in, upon, over or across said premises now outstanding in third parties, if any, and the covenants, conditions and obligations hereinafter set forth.

1. It is agreed that the *party of the second part shall* commence operation to remove sand and/or gravel from the premises above described within one year from date hereof and shall keep a daily record of all sand and/or gravel removed from said premises and shall *file a written notice and report with the party of the first part at it's office in the State Capitol in Oklahoma City, Oklahoma, each thirty (30) day period, beginning thirty days (30) after the date of this contract, giving the total number of cubic yards of sand and/or gravel removed during the immediately preceding thirty (30) days period,* and after twenty thousand (20,000) cubic yards of such materials has been removed from said premises, a remittance for any excess materials removed within the thirty (30) day periods must accompany the notice and report.

2. It is agreed and understood that party of the first part, its representatives or agents, shall be allowed to enter upon and into any part of the premises for the purpose of inspection, and that they shall have access, at reasonable times and places, to the books and records of party of the second part, showing the amounts of sand and/or gravel removed from the premises, for auditing purposes.

3. It is agreed and understood that party of the

second part shall operate all workings upon the premises in a workmanlike manner, and that it will hold party of the first part harmless from any and all claims which might arise from the operations under this contract, and that at the expiration of this contract, or the prior termination thereof, it will remove from the premises all machinery, dredges, boats, pipes, piers, buildings and all other appliances, equipment or devices erected upon the premises or used in connection with the operations under this contract, and it shall promptly surrender and return the premises to party of the first part, or to whomsoever as shall be legally entitled thereto.

4. It is agreed and understood that party of the second part shall use the premises only for the purpose herein specified, and that party of the second part shall not cause or permit any nuisance to be maintained upon the premises.

5. It is agreed and understood that party of the second part shall not install, maintain or operate any device which will interfere with navigation upon said Arkansas River without prior approval from the duly constituted authorities.

6. It is agreed and understood that party of the second part shall be liable to the riparian owners adjacent to the premises included within this contract, for any and all damages or losses which may accrue to such adjacent riparian owners by reason of the removal of sand and/or gravel from the premises, and in the event of such loss or damage, if the party of the second part and such riparian owner or owners adjacent to the premises cannot agree upon the amount of such damages the same shall be determined in the manner now provided, or which may hereafter be profided by the laws of the State of Oklahoma. Party of the second part agrees to pay all such damages so determined within ten (10) days

after the final determination thereof, and the amount of such damages may be recovered from the party of the second part or the surety upon its bond given to secure the faithful performance of the covenants, conditions and agreements contained in this contract.

7. It is agreed and understood that no assignment, sale or transfer of this contract, or any part thereof, whether by act of the parties or by operation of law, shall be valid or convey to and vest in the assignee, transferee or purchaser, any right, title, interest, equity or estate in or to the premises, unless such assignment, transfer or sale shall first be approved in writing by party of the first part, and a copy of the assignment, transfer, bill of sale, or other written evidence thereof, be filed in the office of the party of the first part; and any such transferee, assignee, or purchaser, if approved by party of the first part, shall furnish a bond to the satisfaction of party of the first part, conditioned for the faithful performance of the terms, covenants and conditions of this contract, and the payment of such transfer fee as may be required by the rules and regulations of the party of the first part.

8. It is agreed and understood that before this contract shall be of any force and effect, party of the second part shall give a good and sufficient bond in the penal sum of One Thousand ($1,000.00) Dollars, conditioned for the faithful performance of the terms, covenants and conditions of this contract by party of the second part, such bond to be approved by party of the first part.

9. It is agreed and understood that all machinery, tools, equipment, engines, dredges, boats, piers, and all other property used by party of the second part to remove sand and/or gravel from the premises shall remain the property of the party of the second part, and the

same may be removed from the premises at any time prior to the termination of this contract, provided, however, that party of the first part shall have a lien upon all such equipment, and upon all sand and/or gravel in excess of twenty thousand (20,000) cubic yards, which has been removed from the premises but not sold, wherever located, for any and all sums which are or may be due to party of the first part from party of the second part, and any encumbrances placed upon such equipment shall be subject to and inferior to the prior lien thereon held by party of the first part.

10. It is agreed and understood that this contract grants unto party of the second part the right to remove only sand and/or gravel from the premises and that party of the second part shall not knowingly remove from the premises any gold, silver, cinnabar, lead, zinc, tin, copper, nickel, asphalt, coal gypsum, glass sand, saline deposits, precious stones, or any material which may be the source of fissionable materials, or other valuable deposits, in commercial quantities.

11. It is agreed and understood that the terms, covenants, conditions and obligations contained in this contract shall be binding upon the successors or assigns of the parties, and that upon the violation or breach of any of them or the laws of the State of Oklahoma, relating to public lands, party of the first part shall have the right to revoke and cancel this contract, upon 30 days written notice of cancellation to party of the second part at its office and place of business in Fort Smith, Arkansas, or any other office it may maintain.

12. It is agreed and understood that at the expiration of the term of this contract, should party of the second part desire to obtain an extension or renewal thereof, and should party of the first part desire to lease or let the premises for the purpose of removal of sand and/or

gravel therefrom, said party of the second part shall have the right to, and receive, all rights or privileges usually extended to preference right lessees by party of the first part, in the renewal or extension of surface leases, upon such terms and conditions, and for such rental as may be fixed by party of the first part or their successors, either at public or private sale.

IN WITNESS WHEREOF the Commissioners of the Land Office of the State of Oklahoma, for and on behalf of the State of Oklahoma, have caused these presents to be executed by their Vice Chairman and attested by their Secretary, on the date first above written, and Yahola Sand and Gravel Company, a corporation, has caused these presents to be executed by its Vice President and attested by its Asst. Secretary.

ATTEST: (SEAL)
/s/ (Illegible Signature)
_____Secretary

THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA

By /s/ James M. Bullard
Vice Chairman
PARTY OF THE FIRST PART

ATTEST: (SEAL)
/s/ Winifred Reitz
Assistant Secretary

YAHOLA SAND AND GRAVEL COMPANY,

By /s/ William Dills
Vice President
PARTY OF THE SECOND PART

[JURAT]

AMENDMENT TO
SAND AND/OR GRAVEL LEASE CONTRACT
Dated July 28, 1964

Easement No. 3969

Lease No. CS-5412
Easement No. 3744

KNOW ALL MEN BY THESE PRESENTS:

In consideration of the sum of Fifty ($50.00) Dollars, the receipt of which is hereby acknowledged, and for good cause shown, the Commissioners of the Land Office of the State of Oklahoma hereby amend covenant No. 1 of page 1 of Sand and/or Gravel Lease Contract dated July 28, 1964, by and between the Commissioners of the Land Office of the State of Oklahoma for and on behalf of the State of Oklahoma, party of the first part, and Yahola Sand and Gravel Company, a corporation, party of the second part, to extend the period of time within which to commence operation to remove sand and/or gravel from that part or portion of the bed of the Arkansas River in the following sections:

Sections 33 and 34, Township 12 North, Range 21 East, situate in Muskogee and Sequoyah Counties, Oklahoma,

to February 15, 1967.

It is agreed and understood that this Amendment shall in no wise affect any of the other covenants, conditions and obligations set forth in said Sand and/or Gravel Lease Contract and that this Amendment shall be binding upon the successors or assigns of the parties to said contract, and that upon the violation or breach of any provision of said contract as amended the party of the

first part shall have the right to revoke and cancel said contract upon thirty (30) days written notice of the cancellation to the party of the second part at its office and place of business in Fort Smith, Arkansas, or any other office it may maintain.

IN WITNESS WHEREOF the said parties have caused their signatures to be subscribed hereto this 8th day of February, 1966.

ATTEST: (SEAL)
_____ Secretary

COMMISSIONERS OF THE LAND OFFICE STATE OF OKLAHOMA

By /s/ James M. Bullard
Vice Chairman
PARTY OF THE FIRST PART

ATTEST: (SEAL)

/s/ (Illegible Signature)
_____Secretary

YAHOLA SAND AND GRAVEL COMPANY

By /s/ R. N. Dills
_____President
PARTY OF THE SECOND PART

NATIONAL SURETY CORPORATION
A Member of The FUND Insurance Companies

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that NATIONAL SURETY CORPORATION, a Corporation duly organized and existing under the laws of the State of New York, and having its principal office in the City of New York, New York, and its home office in the City

and County of San Francisco, California (hereinafter called the Corporation), has made, constituted and appointed, and does by these presents make, constitute and appoint

Arthur J. Beach

of Oklahoma City and State of Oklahoma its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred in its name, place and stead, to execute, seal, acknowledge and deliver any and all bonds, recognizances, contracts, agreements of indemnity and other conditional or obligatory undertakings;

and to bind the Corporation thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the corporate seal of the Corporation and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney(s)-in-Fact may do in the premises.

IN WITNESS WHEREOF, NATIONAL SURETY CORPORATION has caused these presents to be signed by its

Vice President, attested by its Assistant Secretary, and its corporate seal to be hereto affixed this 21st day of December A.D., 1966.

NATIONAL SURETY CORPORATION
By C. A. Keppler
Vice President

[Seal]

ATTEST: George F. Texido
Assistant Secretary

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

On this 21st day of December A.D., 1955, before me

personally came C. A. Keppler–Maplewood, New Jersey, to me known, who, being by me duly sworn, did depose and say, that he is Vice President of NATIONAL SURETY CORPORATION, the Corporation described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order. And said C. A. Keppler further said that he is acquainted with Geo. F. Texido and knows him to be an Assistant Secretary of said Corporation; and that he executed the above instrument.

Elizabeth C. King
Notary Public

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

I, Geo. F. Texido, Assistant Secretary of NATIONAL SURETY CORPORATION, do hereby certify that the following is a full, true and correct copy of Article VIII of the By-laws of the NATIONAL SURETY CORPORATION adopted on the 25th day of October, 1955, and now in full force and effect, to wit:

ARTICLE VIII

Appointment and Authority of Resident Assistant Secretaries, and Attorneys-in-Fact and Agents to Accept Legal Process and Make Appearances.

"SECTION 30. APPOINTMENT. The President, any Vice President or any other person authorized by the Board of Directors, the Chairman of the Board of Directors, the President or any Vice President, may, from time to time, appoint Resident Assistant Secretaries and Attorneys-in-Fact to repre-

sent and act for and on behalf of the Corporation and Agents to accept legal process and make appearances for and on behalf of the Corporation.

"SECTION 31. AUTHORITY. The authority of such Resident Assistant Secretaries, Attorneys-in-Fact, and Agents shall be as prescribed in the instrument evidencing their appointment, and any such appointment and all authority granted thereby may be revoked at any time by the Board of Directors or by any person empowered to make such appointment."

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of NATIONAL SURETY CORPORATION, this 21st day of December, 1955.

Geo. F. Texido
Assistant Secretary of
[Corporate Seal] NATIONAL SURETY CORPORATION

STATE OF OKLAHOMA
COUNTY OF OKLAHOMA ss.:

I, A. MacDonald, Resident Assistant Secretary of NATIONAL SURETY CORPORATION, a corporation of the State of New York, do hereby certify that the above and foregoing is a full, true and correct copy of the original power of attorney issued by said Corporation and that I have compared same with the original and that it is a correct transcript therefrom and of the whole of the original. Said power of attorney is in full force and effect and has not been revoked.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Corporation, at the City of Oklahoma City, Okla. this 22nd day of July 1964.

A. MacDonald
Resident Assistant Secretary

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, Yahola Sand and Gravel Company, a corporation, 326 Merchants National Bank Building, Fort Smith, Arkansas, authorized to do business in the State of Oklahoma, as principal and National Surety Corporation, a corporation, organized and existing under the laws of the State of New York, fully authorized to transact business in the State of Oklahoma, whose principal office is , as surety, are held and firmly bound unto the State of Oklahoma in the sum of One Thousand Dollars ($1,000.00) for the payment of which amount we hereby bind and obligate ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

The conditions of the above obligation are such that if the above bounded Yahola Sand and Gravel Company, a corporation, its successors and assigns, or any of them, do and shall well and truly in all things perform faithfully and keep each and all of the covenants, conditions and agreements specified and contained in a certain lease contract made or to be made and executed by the Commissioners of the Land Office of the State of Oklahoma for and on behalf of the State of Oklahoma, in favor of said Yahola Sand and Gravel Company, a corporation, for a period of four years, for the purpose of removing sand and/or gravel from that part or portion of the bed of the Arkansas River in the following Sections:

> 33 and 34 in Township 12 North, Range 21 East, situate in Muskogee and Sequoyah Counties, Oklahoma,

and a copy of said Easement contract will remain on file in the office of the Secretary to the Commissioners of the Land Office of the State of Oklahoma and is hereby

referred to and made a part hereof, as fully and completely as if set out in hull herein, which on the part of said Yahola Sand and Gravel Company, a corporation, ought to be performed, fulfilled and kept according to the true meaning and intent thereof, then the above obligation is to be void, otherwise, the same shall remain in full force and effect.

IN WITNESS WHEREOF, We have hereunto set our hands this 22nd day of July, 1964.

ATTEST: (SEAL)

/s/ Winifred Retz
Asst. Secretary

YAHOLA SAND AND GRAVEL COMPANY, a corp.,
PRINCIPAL

By /s/ William Dills
Vice President

By /s/ (Illegible Signature)
Attorney in Fact

COUNTER-SIGNED:
/s/ (Illegible Signature)
Resident Attorney in Fact
for Oklahoma
2000 Classen Blvd.
Oklahoma City, Okla.,
Address of Resident Attorney in Fact

The above and foregoing Bond approved this 28th day of July, 1964.

ATTEST: (SEAL)

/s/ (Illegible Signature)
_____Secretary

COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA

By /s/ (Illegible Signature)
Vice Chairman

THE COMMISSIONERS OF THE LAND OFFICE,
Oklahoma City, Okla.

[Permanent Fund.]
Acknowledges Receipt of
$50.00 **Applied as Follows**

Date Feb. 8, 1966

Loan No. _____

Sales No. _____

Lease No. CS-5412

County Muskogee &/or Sequoyah

Consideration for
an Amendment $50.00

Consideration for an Amendment to Sand and/or Gravel Lease Contract dated July 28, 1964, Easement No. 3744, covering certain parts or portions of the bed of the Arkansas River.

[Yahola Sand and Gravel Company
326 Merchants National Bank Bldg.
Fort Smith, Arkansas]

Rem. # 7309 (Ck. # 10323)

[Amendment filed as Easement No. 3969 and Attached to Easement No. 3744]

MISCELLANEOUS RECEIPT

[Paid February 9, 1966
Commissioners of Land
Office]

[Filed, January 19, 1967]

MEMORANDUM OF DECISION

At a conference on January 13, 1967, between the court and counsel for the majority of the parties involved in the above cases, held for the purpose of arriving at an expeditious handling of the litigation, the court determined after full consultation with the attorneys present, as follows:

1. In the event the Cherokee Nation can be made a party litigant in Case No. 5649, by voluntarily intervening, by being brought in on the motion of an interested party, or at the instance of the court on its own motion, as a necessary party to resolve conflicting claims, the court will undertake to reach a final conclusion in such case as early as possible, holding in abeyance a decision in the remaining cases above listed until final determination in the event of an appeal. The attorneys for the Cherokee Nation have been allowed 15 days in which to decide whether the interests of the tribe in the property involved in the suit is such that they are warranted, in acting in the best interests of the Nation, to petition the court for leave to intervene. At the same time, counsel for other interested parties are given 15 days in which to move the court to make the Cherokee Nation a party to the suit pursuant to the provisions of Rule 19 of the Federal Rules of Civil Procedure. Also, any interested parties, particularly the State of Oklahoma, are requested to submit a brief to the court directed to the authority of the court to require the Cherokee Nation to participate in the litigation.

2. Since a resolution of the rights of the parties to these suits requires a determination of the conflicting claims of the Cherokee Nation and the Choctaw-Chickasaw Nations and between them and the

State of Oklahoma, and since the attorney for the Choctaw-Chickasaw Nations has indicated an intention to intervene in Case No. 6219, the court will undertake to reach a final decision in this case first in the event the Cherokee Nation cannot be made a party to Case No. 5649.

3. As a third possibility, should neither of the above cases work out to be a suitable vehicle for reaching a decision determinative of the rights of all the parties, the court will undertake to select an appropriate United States land condemnation action to conclude as early as practicable.

With a view to allowing counsel ample opportunity to brief fully the questions involved in these cases, the court has concluded that an additional period of 60 days, until March 15, 1967, should be allowed for any attorneys for the parties in these actions to submit briefs, additional briefs, or supplemental briefs directed to the legal issues, as distinguished from factual disputes, involved. These issues are as follows:

1. The navigability of the Arkansas River. Here the primary issue seems to be whether the navigability of the river in the area in which we are concerned in these suits has been established as a matter of law, either by congressional action or by judicial decision; whether an evidentiary hearing is necessary to determine the navigability of the stream; and whether the court can take judicial notice that the river is navigable or that the river is not navigable.

2. The ownership of the river bed. This involves a determination of the legal effect of the treaties between the United States and the Indian tribes with respect to the land conveyed to the tribes, and as an incident thereto a determination of the rights of the State of Oklahoma in the river bed.

3. The effect of movement of the river. It appears to be generally understood and agreed between court and counsel for the parties that with any gradual change in the bed of the river the ownership of the bed moves with the river, with riparian owners gaining or losing land by accretion or reliction. The problem in this area, therefore, appears to be primarily the effect on the ownership of the bed of the river of an avulsive change. Does existing ownership of the bed shift with the river or remain where it was, or both? Related to this problem is the situation where the course of the river is altered by the physical act of the government rather than by natural phenomenon.

4. Dates. It may be important to a determination of the issues to determine as a matter of law the date on which the river was held to be navigable or not navigable. Further it may be important to determine the treaty or act of Congress which is controlling in determining the issue of ownership of the river bed, and therefore the date of the instrument or act.

There may be other legal issues to be considered, such as the rights of sovereignty of the parties involved, and the applicability of statutes of limitation. For the present, however, the court will leave it to the discretion of counsel whether to include in their respective briefs any discussion of such related issues. Such issues may not be involved in Case No. 5649, but probably would be involved in Case No. 6219.

The court desires to point out further that briefs are not required of the parties, and no further briefs are required of those who have already submitted briefs. The purpose of this memorandum of decision is to permit the filing of such briefs.

Edwin Langley
District Judge

[Filed, January 27, 1967]

ANSWER AND CROSS-PETITION OF DEFENDANT, JAKE L. HAMON

Comes now Jake L. Hamon and for answer to complaint herein filed, states:

This defendant has no knowledge as to the facts alleged in said complaint and demands proof thereof.

CROSS-BILL

By way of cross-petition herein this defendant does respectfully show:

That on the 11th day of May, 1961, Charlye V. Davidson as executrix of the estate of C. E. Forrester, deceased, executed and delivered to Mark L. Douglass as lessee an oil and gas mining lease covering, among other lands, Lot 2, Northeast 9.8 acres of Lot 4, all of Lots 5 and 6, and the East 16.65 acres of Lot 7, and the Northwest 10 acres of Lot 8, Section 4, Township 9 North, Range 25 East, together with all accretions or avulsions to such lands, which said lease is of record in Book 385, Page 18 of the records of LeFlore County, Oklahoma; that said lease was thereafter assigned by the said Mark L. Douglass to the undersigned Jake L. Hamon by assignment.

That on the 17th day of December, 1956, Tony Zager and wife, Nettie M. Zager, executed to the Pure Oil Company an oil and gas mining lease covering SW¼ of SE¼ of SE¼, and NW¼ of SE¼ of NW¼, and SW¼ of SE¼, and Southwest 10 acres of Section 9, Township 9 North, Range 25 East, same being of record in Book 340, Page 74 of the records of LeFlore County, and that said lease as to the SW¼ of SE¼ of SE¼, and NW¼ of SE¼ of NW¼, and SW¼ of SE¼, and Southwest 10 acres

of Lot 7 of Section 4, Township 9 North, Range 25 East, was assigned to this answering defendant, who thereafter, insofar as said lease covered the NW¼ of SE¼ of NW¼ of said Section 4, assigned said lease to the Sinclair Oil & Gas Company insofar as the same covered formations to the base of the Cromwell.

That on the 13th day of January, 1965, C. R. Campbell and wife, Georgann Jones Campbell, executed to this answering defendant an oil and gas mining lease covering the East 10.20 acres of Lot 8, Section 4, Township 9 North, Range 25 East, which said lease is of record in Book 438, Page 234 of the records of LeFlore County.

That on the 16th day of November, 1965, the State of Oklahoma, acting by and through the Commissioners of the Land Office of the State of Oklahoma, executed and delivered to this defendant an oil and gas mining lease, same covering all of the Arkansas River bed in Section 3, Township 9 North, Range 25 East, which said lease is of record in Book , Page , of the records of LeFlore County, Oklahoma.

That the leases above described from Charlye V. Davidson, Executrix, Tony Zager and wife, and C. R. Campbell and wife covered lands which were littoral to the Arkansas River bed where said river flows across Section 4, Township 9 North, Range 25 East, and that said leases covered all riparian and accretion rights to said lands.

Further this answering defendant would show that Section 4, Township 9 North, Range 25 East, constitutes a drilling unit pursuant to order of the Corporation Commission of the State of Okalahoma and that this answering defendant is the operator of said unit and that a well has been drilled and is productive of gas, same being located in the NE¼ of NE¼ of SW¼ of said

Section 4. That this defendant is entitled to have all of his rights as operator of said unit confirmed in him as to all of said unit and as to all lands, mineral right owners and their lessees in said unit.

This defendant prays that his rights under said leases and as operator of the unit above referred to be confirmed in him.

Jake L. Hamon
By Dyer & Dyer
/s/ Ezra Dyer

Box 568–Ardmore, Okla.
Attorneys for Defendant
Jake L. Hamon

[Filed, January 30, 1967]

ANSWER OF TENNECO OIL COMPANY

Comes now Tenneco Oil Company and for answer to plaintiff's complaint alleges and states:

1. Defendant admits the jurisdiction of this Court as alleged in paragraph 1 of the complaint and further states that jurisdiction of this Court is invoked by reason of paragraph (a) of Section 1331, Title 28 U.S.C.A.

2. Defendant admits the matters contained in paragraphs II and IV of the complaint reserving the right to object to their relevancy and accuracy after comparison with the original instruments.

3. Defendant specifically denies the allegations contained in paragraphs III, V, VI and VII of plaintiff's complaint.

COUNTER CLAIM

Defendant alleges that upon admission of Oklahoma into the Union, the title to the bed of the Arkansas River below high-water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkansas River was navigable and that part of the river bed described in plaintiff's complaint is now and has been since Oklahoma was admitted to the Union the property of the sovereign state of Oklahoma.

Defendant, Tenneco Oil Company, further alleges that it is the owner of four valid and subsisting oil and gas leases dated February 8, 1966, purchased for valuable consideration from the State of Oklahoma covering all that portion of the Arkansas river bed lying and situate in Sections 21, 22, 26 and 27 of Township 10 North, Range 26 East, in LeFlore and Sequoyah counties, Oklahoma.

Defendant further states that the purported claim of plaintiff is without merit and constitutes a cloud on the title of defendant's lessor, the State of Oklahoma, and on the title of defendant's oil and gas leases above described.

WHEREFORE, defendant prays that plaintiff take nothing by reason of its complaint and that this defendant have judgment herein quieting its title to its oil and gas leaseholds herein described, for possession thereof and for such other and further relief as the Court may deem just and proper.

TENNECO OIL COMPANY

By /s/ Glenn R. Davis
Of Boesche, McDermott & Eskridge
300 Drew Building
Tulsa, Oklahoma

[Filed, January 30, 1967]

ANSWER OF DEFENDANT, CITIES SERVICE OIL COMPANY, A CORPORATION

Comes now the defendant, Cities Service Oil Company, for its answer to plaintiff's complaint herein, alleges and states:

1. This defendant is without knowledge as to the matters and facts contained in plaintiff's complaint as filed herein, except such as are hereinafter admitted, qualified or explained, and, therefore, neither admits nor denies such allegations, but asks that plaintiff be required to submit strict proof thereof.

2. This defendant further states that on or about the 8th day of February, 1966, the Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, as owners and in possession of the following described land located in LeFlore and/or Sequoyah Counties in the State of Oklahoma, to-wit:

> That part or portion of the following sections or parts of sections in the Arkansas River Bed, containing 100 acres, more or less, set opposite Section 2, Township 9N., Range 25E.,

executed, acknowledged and delivered to Cities Service Oil Company, a certain oil and gas mining lease covering all of the above described land, which lease was duly filed for record on the 28th day of June, 1966, in the Office of the County Clerk of Sequoyah County and State of Oklahoma, and duly recorded in Book 309 at Page 563, copy of said lease is attached hereto as Exhibit "A".

3. This defendant further answering plaintiff's complaint alleges and states that it is the owner of said oil and gas mining lease set out above, and that all of the terms, covenants and conditions of said oil and gas min-

ing lease have been fully kept and performed by this defendant, and that said lease is valid and subsisting at this time.

4. This defendant further says that the said oil and gas mining lease set out above provides, among other things, that unless one well producing oil or gas in paying quantities shall be drilled and completed within one year from the date thereof, or failing so to do said lease shall terminate unless the lessee on or before the expiration of said one year period shall pay to the lessor the sum of One Dollar ($1.00) per acre for the privilege of delaying the drilling and completion of such a well for an additional year. In like manner and upon like payments the completion of a well producing oil or gas in paying quantities may further be deferred.

This defendant has elected to pay the annual rental for the year commencing February 8, 1967 and has paid the same according to the terms of said lease to lessor, but to avoid any question as to proper payment and payee, does hereby tender into the Registry of this Court a duplicate payment in the sum of One Hundred Dollars ($100.00).

Wherefore, this defendant prays that it be decreed to be the owner and holder of a valid and subsisting oil and gas mining lease as herein set out and that during the pendency of this cause that this defendant be authorized to pay annual rentals, if this defendant elect to pay the same, to the Registry of this Court and further, if plaintiff be not adjudged to be the owner of the lands described in said oil and gas mining lease that any and all delay rental payments paid into the Registry of this Court be distributed to the proper party.

This defendant further prays for such other and additional relief to which it may be in equity and good conscience entitled.

/s/ Roy Z. Johnson
Attorney for Defendant,
Cities Service Oil Company
Bartlesville, Oklahoma

EXHIBIT "A"

THE STATE OF OKLAHOMA
OIL AND GAS MINING LEASE

[Filed March 2, 1966]

THIS LEASE, Made and entered into in duplicate, on this 8th day of February, A.D., 1966, by and between the Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, parties of the first part, hereinafter designated as lessor, and Cities Service Oil Company party of the second part, hereinafter designated as lessee, whose post office address is 105 Southeast 45 Street Oklahoma City, Oklahoma.

(The post office address of lessee for all purposes hereunder shall be as stated until lessor has received written notice of a change thereof).

Under and in pursuance of the provisions of the Constitution and Laws of the State of Oklahoma relating to the segregation of the oil and gas deposits and leasing thereof on school and other public lands belonging to the State of Oklahoma, WITNESSETH:

1. The Lessor, for and in consideration of Six thousand one hundred twenty five dollars and no/100 (6,125.00) DOLLARS, the receipt of which is hereby acknowledged, and the rents and royalties to be paid, and the convenants, stipulations and conditions to be observed and performed as herein set forth, does hereby demise, lease and let unto the lessee for a term of five (5) years from the date hereof and as long thereafter as oil or gas or either of them is produced in paying quantities, the following described tract(s) of land situated in the County of LeFlore and/or Sequoyah Counties, in the State of Oklahoma, to-wit:

That part or portion of the following sections or parts of sections in the Arkansas River Bed containing the approximate acreage set opposite the described sections in LeFlore and/or Sequoyah Counties:

Section 2-9N-25E

containing 100 acres, more or less, and does hereby grant to the lessee the exclusive right and privilege to prospect and drill for, mine and extract all of the oil and natural gas deposits in or under said land, together with the right to pipe, store and remove oil and natural gas and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing and removing such oil, distillate and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owner or lessee, and also the right to use, free of cost, oil, gas and casinghead gas for fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to deliver or cause to be delivered to the Commissioners of the Land Office of the State of Oklahoma, or their successors, without cost into pipe lines, a royalty of one-eighth (1/8) part of the oil or gas produced from the leased premises and a one-eighth (1/8) part of all casinghead or drip gas or gasoline or other hydrocarbon substances produced from any well or wells on said premises, or in lieu thereof, pay to lessor the market value thereof, as the Commissioners may elect; provided, however, the royalty due and payable under this lease shall not in any event be less than Two Dollars and Fifty Cents ($2.50) per acre as specified in Paragraph 3 of this contract. The lessee shall furnish to

the lessor certified copies of gauge tickets, sales, shipments and amounts of gross production, at its office in Oklahoma City, Oklahoma. Gas is to be metered on the premises under presure of 4 ounces above an assumed atmospheric pressure of 14.4 pounds per square inch at a temperature of 60 degrees Fahrenheit, or computed to that measurement.

3. Commencing at the first anniversary of the date of this lease after the completion of a well or wells producing or capable of producing oil or gas in paying quantities, lessee shall pay to lessor a royalty of not less than Two Dollars and Fifty Cents ($2.50) per acre per year, due and payable annually on or before the 25th day of the month following the end of each twelve months period thereafter during the life of this lease, provided that if oil or gas is being produced and taken from the leased premises and the royalty paid by the lessee thereon is less than the minimum royalty above specified, the difference between the amount so paid during any twelve months period between anniversaries of the date of the lease and the minimum annual royalty of Two Dollars and Fifty Cents ($2.50) per acre shall be paid by lessee to lessor on or before the 25th day of the month following the end of the yearly period in which such minimum royalty has accrued. Provided, further, that nothing herein shall be construed to excuse the commencement of production and marketing of oil or gas from the leased premises and the continuation of such production and marketing as required by other provisions of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on the land covered by this lease, and shall drill a sufficient number of wells to directly offset the wells upon adjoining contiguous premises, said offset wells to be commenced within sixty (60) days

after commencement of marketing from the well upon such adjoining contiguous premises unless a longer time is prescribed by notice in writing from the lessor, and be prosecuted diligently and continuously until completed; and the said lessee shall operate the leased premises for oil and gas to the same extent as individual and corporate premises are being operated within the general oil and gas fields where such land is located, and failure to faithfully comply with this provision shall be cause for forfeiture of this lease to the State.

5. At least one well producing oil or gas in paying quantities shall be drilled and completed within one year from the date hereof, or failing so to do this lease shall terminate as to both parties, unless the lessee on or before the expiration of said one year period shall pay to the lessor, at its office in the State Capitol Building, Oklahoma City, Oklahoma, the sum of One Dollar ($1.00) per acre for the privilege of delaying the drilling and completion of such a well for an additional year. In like manner and upon like payments the completion of a well producing oil or gas in paying quantities may further be deferred for like periods successively not exceeding five (5) years from the date hereof, it being understood that the completion of a well producing oil or gas in paying quantities during the life of this lease shall relieve the lessee of all future liability for said One Dollar ($1.00) per acre rent hereunder, but the lessee shall nevertheless remain obligated to drill an offset, or necessary offsets, and other wells necessary to the proper development and operation of said lease as herein otherwise provided, until the lease is fully developed; and provided, further, that unless a well producing oil or gas in paying quantities is completed on the above described premises within five (5) years from the date hereof, this lease shall be void.

Filed for record this the 28 day of June, 1966 at 9 o'clock a.m.

6. The lessee shall carry on the development and operation in a workmanlike manner, commit no waste on said land, and suffer none to be committed upon the portion in his occupancy or use; take good care of the same, and promptly surrender and return the premises upon the termination of this lease to the lessor, or to whomsoever shall be lawfully entitled thereto, unavoidable casualty only excepted.

7. All tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells, shall remain the property of the lessee, and may be removed at any time prior to or at the termination of the lease by forfeiture or otherwise; and the lessee shall not permit any nuisance to be maintained on the premises; and shall not use said premises for any purposes than those authorized in the lease; and before abandoning any well, shall securely plug the same so as to effectually shut off water from the oil-bearing stratum, and in the manner required by the rules and regulations of the Oklahoma Corporation Commission and the laws of the State of Oklahoma.

8. The lessee shall keep an accurate account of all oil and gas mining operations, including a log of each well drilled, duty sworn to by the contractor or driller, which shall be filed with the Secretary to the Commissioners of the Land Office within thirty (30) days after said well is completed. Accurate and reliable information concerning all wells and their operation and management shall be furnished to the Commissioners of the Land Office or their representatives upon demand. The said lessee shall also keep an accurate account showing the sales, prices, dates, purchases, and the whole amount of oil and gas mined or removed, and all sums due as royalties shall be a lien on the implements, tools and movable machinery or personal chattels used in operating said property, and

also upon all the unsold oil and gas obtained from the land herein leased as security for the payment of said royalties.

9. The lessee shall be liable to the surface owner or surface lessee for all damages or loss accruing to the surface interests in said land, and to all crops and improvements thereupon, and appurtenances and hereditaments thereunto belonging by reason of the oil and gas mining operations hereunder, and in the event the amount of such damage cannot be agreed upon by the lessee hereof and such surface owner or lessee then the amount of such damage shall be determined as is or may be provided by law. The lessee hereof further agrees to pay all such damages within ten (10) days after the amount thereof is determined, and the amount of such damages may be recovered from the lessee hereof and his sureties upon the bond given to secure the faithful performance of this lease.

10. This lease shall be subject to the constitution and laws of the State of Oklahoma and the rules and regulations of the Commissioners of the Land Office now or hereafter in force relative to such leases; all of which are made a part and condition of this lease; Provided, That no regulations made after the execution of this lease affecting either the length of the term hereof, the rate of royalty, or payment hereunder or the assignment hereof, shall operate to affect the terms and conditions of this lease.

11. No transfer or assignment of this lease or any part thereof, shall be valid, or convey any right in the assignee without the consent in writing of the Commissioners of the Land Office; and such assignee shall furnish a bond to the satisfaction of the Commissioners of the Land Office, conditioned for the faithful performance of the convenants and conditions of this lease, and pay the assignment fee.

12. Before this lease shall be in force and effect the lessee shall give a good and sufficient bond, to be approved by the Commissioners of the Land Office, for the faithful performance of this lease.

13. Upon the violation of any of the substantial terms or conditions of this lease, the Commissioners of the Land Office shall have the right at any time after hearing upon fifteen (15) days notice, given by registered mail to the last known address of such lessee, specifying the terms or conditions violated, to declare this lease null and void, provided any person affected thereby may appeal to the district court of the county where the land is situated; and the said Commissioners for and on behalf of the State of Oklahoma, shall be entitled to recover from the lessee's bondsmen, all rents, royalties, charges, claims of every kind and nature due and owing and accruing and arising out of and by reason of this lease, on failure to comply with the provisions thereof, and the lessors shall be entitled and authorized to take immediate possession of the land.

14. It is further agreed that for any refinery of crude oil and its products and by-products, owned and controlled by the State of Oklahoma, the State shall have the preference right to purchase and receive the output from said premises at the market price thereof; Provided, that this clause shall not prevent the lessee from selling the output of said lease to any person, firm or corporation whatsoever until notice in writing from the Commissioners of the Land Office shall be served on the lessee that the State is ready to take such oil and gas or either of them, and all sales of oil and gas or either of them under this proviso shall be valid and binding.

15., The lessee may at any time hereafter surrender and wholly terminate this lease upon payment of all liabilities then accrued and due hereunder, and may exercise such right by filing a formal relinquishment and

release of the said lease with the Secretary to the Commissioners of the Land Office, Provided, that if such lease has been recorded in the county, the release thereof must be recorded in the county prior to filing with the Secretary to the Commissioners of the Land Office.

16. The surface owner or lessee of said premises shall have gas free of cost from any gas well on said premises for use of principal dwelling thereon by making his own connection with the well.

17. If lessor herein owns a less interest in the minerals in the heretofore described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the lessor only in the proportion which its mineral interest bears to the whole and undivided fee.

In WITNESS WHEREOF, the parties hereunto subscribed their signatures on the day and year first above written.

ATTEST: THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA

Secretary of the Commissioners of the Land Office. /s/ James M. Bullard

Vice Chairman.

ATTEST: CITIES SERVICE OIL COMPANY

Lessee.

Secretary. By: E. E. Owen
Attorney-In-Fact

STATE OF OF OKLAHOMA,)
OKLAHOMA COUNTY,) ss.
)

Personally appeared before me, the undersigned Notary Public, within and for said County and State, James M. Bullard, to me known to be the person who subscribed the name of the Commissioners of the Land Office of the State of Oklahoma, to the foregoing instrument, as its Vice Chairman, and acknowledged to me that he executed the same as his free and voluntary act and deed, and as free and voluntary act and deed of such Commissioners of the Land Office, for the use and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal on this 8th day of March, 1966.

My Commission expires 10-7-67 /s/ Kitty H. Eaves
Notary Public

ACKNOWLEDGMENT FOR INDIVIDUAL

STATE OF OKLAHOMA,

* * *[STAMPED]* * *

My Commission expires

Notary Public

ACKNOWLEDGMENT FOR CORPORATION

STATE OF OKLAHOMA,)
WASHINGTON COUNTY,) ss.
)

Before me, Mary McCarty, a Notary Public in and for said State, on this 21st day of February, 1966, personally appeared E. E. Owen, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its Attorney-in-Fact and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation for the uses and purposes therein set forth.

My Commission expires

Mary McCarty
Notary Public

[Filed June 28, 1966] 55478B
O.G.L.
COMMISSION OF HAND
TO
CITIES SERVICE OIL CO
2-8-66

STATE OF OKLAHOMA
COUNTY OF SEQUOYAH
This instrument was Filed for Record in
the County Clerk's Office

At 9 o'clock a. m., and is Recorded in Book No. 309
Page No. 563

JESS ROSS, County Clerk
Deputy

[Filed, January 31, 1967]

SEPARATE ANSWER OF THE DEFENDANT J. T. STEPHENS, DOING BUSINESS AS STEPHENS PRODUCTION COMPANY

Comes now this defendant, J. T. Stephens, doing business as Stephens Production Company, and for the purpose of his answer alleges and states:

I.

That J. T. Stephens is an individual doing business as Stephens Production Company and maintains an office at 115 North 12th Street, Fort Smith, Arkansas.

II.

That this defendant denies each and every allegation contained in plaintiff's complaint except those matters hereinafter specifically admitted.

III.

That this defendant is the owner of that certain oil and gas mining lease dated July 12, 1961, executed by The Commissioners of the Land Office of the State of Oklahoma, covering that part of the Arkansas River bed Section 33-1ON-25E, LeFlore and/or Sequoyah Counties, State of Oklahoma, and which lease is recorded in Book 384 at Page 533 of the records of the County Clerk, LeFlore County, Oklahoma, and in Book 271 at Page 28 of the records of the County Clerk, Sequoyah County, Oklahoma. That the lands covered by this lease are included in the producing unit known as the Redland Ranch No. 5 Unit comprising all of Section 33-1ON-25E, LeFlore and Sequoyah Counties, Oklahoma, and that said lease is a valid and subsisting lease being held in force by the production of natural gas from the Redland Ranch No. 5 well.

IV.

That this defendant is the owner of that certain oil and gas mining lease dated July 12, 1961, executed by the Commissioners of the Land Office of the State of Oklahoma, covering that part of the Arkansas River bed Section 28-1ON-25E, LeFlore and/or Sequoyah Counties, State of Oklahoma, and which lease is recorded in Book 384 at Page 454 of the records of the County Clerk, LeFlore County, Oklahoma, and in Book 269 at Page 363 of the records of the County Clerk, Sequoyah County, Oklahoma. That the lands covered by this lease are included in the producing unit known as the Hutchinson-Redland Ranch No. 6 Unit comprising all of Section 28-1ON-25E, LeFlore and Sequoyah Counties, Oklahoma, and that said lease is a valid and subsisting lease being held in force by the production of the natural gas from the Hutchinson-Redland Ranch No. 6 well.

V.

That this defendant is the owner of that certain oil and gas mining lease dated November 16, 1965, executed by The Commissioners of the Land Office of the State of Oklahoma, covering that part or portion of the following sections or parts of sections in the Arkansas River bed containing approximately 35 acres in LeFlore and/or Sequoyah Counties, State of Oklahoma, Section 18-1ON-26E and which lease is recorded in Record Book 308 at Page 391 of the records of the County Clerk, Sequoyah County, Oklahoma. That this lease is a valid and subsisting lease being held in force by the payment of delay rentals as therein specified.

VI.

That this defendant is the owner of that certain oil and gas mining lease dated February 8, 1966, executed by The Commissioners of the Land Office of the State

of Oklahoma, covering that part or portion of the following sections or parts of sections in the Arkansas River bed containing approximately 120 acres in the LeFlore and/or Sequoyah Counties, State of Oklahoma, Section 24-1ON-25E, and which lease is recorded in Book 308 at Page 388 in the records of the County Clerk, Sequoyah County, Oklahoma. That this lease is a valid and subsisting lease being held in force by the payment of the delay rentals as therein specified.

WHEREOF, the defendant, J. T. Stephens, doing business as Stephens Production Company, prays that the Court find that he is the true owner of all oil and gas mining leases herein set forth and described and that this defendant be granted all other relief to which he may be entitled.

By /s/ Spence A. Leamons
115 North 12th Street
Fort Smith, Arkansas 72901

Attorney for J. T. Stephens, d/b/a
Stephens Production Company

[Filed, January 31, 1967]

ANSWER

Mobil Oil Corporation and Skelly Oil Company now answer the Complaint as follows:

1. These defendants admit the jurisdiction of this Court as alleged in Paragraph I of the Complaint and under Section 18 of the Act of April 26, 1906 (34 Stat. 137) as construed in *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, and these defendants further invoke jurisdiction of this Court under 28 U.S.C.A., Section 1331, as a matter which arises under certain laws and

treaties of the United States as set out in Paragraph II of the Complaint.

2. These defendants admit the matters contained in Paragraphs II and IV of the Complaint reserving the right to object to their relevancy and accuracy after comparison with the original documents.

3. These defendants specifically deny the allegations contained in Paragraphs III, V, VI, and VII.

COUNTER CLAIM

These defendants allege that upon the admission of Oklahoma into the Union, the title to the bed of the Arkansas River below high-water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkansas River was navigable and that part of the river bed described in plaintiff's Complaint is now and has been since Oklahoma was admitted to the Union the property of the sovereign State of Oklahoma.

Defendant Mobil Oil Corporation further alleges that it is the owner of ten valid oil and gas leases dated November 16, 1965, purchased for valuable consideration from the State of Oklahoma covering the natural bed of the Arkansas River below high-water mark insofar as such bed lies within Sections 27, 31, 32, 33 and 34, Township 11 North, Range 27 East; Sections 4, 5, 6, 7 and 8, Township 10 North, Range 27 East, in LeFlore and Sequoyah Counties, Oklahoma.

Defendant Skelly Oil Company further alleges that it is the owner of four valid oil and gas leases dated November 16, 1965, purchased for valuable consideration from the State of Oklahoma covering the natural bed of the Arkansas River below high-water mark insofar as such bed lies within Section 13, Township 10 North,

Range 26 East; Sections 17 and 18, Township 10 North, Range 27 East; and Section 10, Township 9 North, Range 25 East, in LeFlore and Sequoyah Counties, Oklahoma.

These defendants further allege that the purported claim of plaintiff Cherokee Nation is without merit and constitutes a cloud on the title of the State and on the title of these defendants as lessees of the State of Oklahoma.

WHEREFORE, these defendants pray that plaintiff take nothing by reason of its Complaint and that these defendants by reason of their Counter Claims have judgment herein quieting their leasehold title to the bed of the Arkansas River as described in the Complaint, insofar as such bed lies within the above described sections, and for the possession thereof and for such other and further relief as the Court may deem just and proper.

SKELLY OIL COMPANY
By McAfee, Dudley, Taft, Cates & Mark
Attorneys

By /s/ Judson S. Woodnuff

MOBIL OIL CORPORATION
By /s/ Robert W. Richards
S. M. Groom, Jr.,
Its Attorneys
S. M. Groom, Jr.

[Filed, January 31, 1967]

ANSWER OF DEFENDANT CONTINENTAL OIL COMPANY

1. Defendant, Continental Oil Company, admits the allegations contained in Paragraphs I, II, and IV of the Complaint on file herein.

2. Said defendant denies the allegations contained in Paragraphs III, V, and VI of the Complaint on file herein.

3. Said defendant admits that many leases and contracts covering portions of the Arkansas River bed have been entered into in good faith by various persons, firms, and corporations with the defendants, State of Oklahoma and the Commissioners of the Land Office of the State of Oklahoma, as alleged in Paragraph VII of the Complaint on file herein, but said defendant denies the remaining allegations of Paragraph VII.

WHEREFORE, defendant, Continental Oil Company, prays that plaintiff take nothing under its Complaint, and that judgment be entered for said defendant for such relief as the Court may deem proper.

CONTINENTAL OIL COMPANY

By /s/ Richard R. Linn
Robert E. Gill, Jr.
Its Attorneys
P. O. Box 795
Oklahoma City, Oklahoma, 73101

[Filed, February 1, 1967]

ANSWER OF DEFENDANT SUN OIL COMPANY

1. Defendant, Sun Oil Company, admits the allegations contained in Paragraphs I, II, and IV of the Complaint on file herein.

2. Said defendant denies the allegations contained in Paragraphs III, V, and VI of the Complaint on file herein.

3. Said defendant admits that many leases and contracts covering portions of the Arkansas River bed have

been entered into in good faith by various persons, firms, and corporations with the defendants, State of Oklahoma and the Commissioners of the Land Office of the State of Oklahoma, as alleged in Paragraph VII of the Complaint on file herein, but said defendant denies the remaining allegations of Paragraph VII.

WHEREFORE, defendant, Sun Oil Company, prays that plaintiff take nothing under its Complaint, and that judgment be entered for said defendant for such relief as the Court may deem proper.

SUN OIL COMPANY
By /s/ William C. Phelps
Its Attorney
P. O. Box 1348
Tulsa, Oklahoma 74101.

[Filed February 1, 1967]

ANSWER, COUNTERCLAIM AND CROSS-CLAIM OF DEFENDANT, STEVE GOSE

ANSWER

COMES NOW defendant Steve Gose and, for his answer to the Complaint of the plaintiff, alleges and states:

1. That this answering defendant denies each and every allegation contained in plaintiff's Complaint except those matters hereinafter specifically admitted.

2. That this defendant admits the matters contained in paragraphs II and IV of the Complaint, reserving the right to object to their relevancy and accuracy after comparison with the original documents.

COUNTERCLAIM AND CROSS-CLAIM

Defendant Steve Gose, for his counterclaim against the plaintiff and his cross-claim against all defendants herein, alleges and states:

1. That this defendant is the owner of a valid and subsisting oil and gas lease from the State of Oklahoma, as lessor, to defendant Humble Oil & Refining Company as lessee, which lease is dated May 31, 1961, and covers the natural bed of the Arkansas River below the high water mark insofar as such bed lies within Section 24, Township 10 North, Range 23 East, Haskell and Sequoyah Counties, State of Oklahoma, down to the base of the Spiro formation, which oil and gas lease is subject to bear an overriding royalty of 1/8th of 7/8ths of total production, which overriding royalty interest is owned by defendant Humble Oil & Refining Company.

2. That the purported claim of plaintiff is without merit and constitutes a cloud on the title of this defendant; that the claims of all defendants herein in and to the above described premises are inferior and subject to the oil and gas leasehold estate of this defendant.

WHEREFORE, defendant Steve Gose prays that plaintiff take nothing by reason of its Complaint and that this defendant, by reason of its counterclaim and cross-claim, have judgment herein quieting its title as above set forth against all parties hereto, and for such other and further relief as the Court may deem just and reasonable.

WALKER & WATSON

By /s/ H. B. Watson, Jr.

Attorneys for Defendant
Steve Gose

[Filed February 1, 1967]

ANSWER, COUNTERCLAIM AND CROSS-CLAIM OF DEFENDANT, UNION OIL COMPANY OF CALIFORNIA

ANSWER

COMES NOW defendant Union Oil Company of California and, for its answer to the complaint of the plaintiff, alleges and states:

1. That this answering defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California and duly domesticated and authorized to do business under the laws of the State of Oklahoma; that defendant Union Oil Company of California is successor by merger to The Pure Oil Company, an Ohio corporation.

2. That this answering defendant denies each and every allegation contained in plaintiff's Complaint except those matters hereinafter specifically admitted.

3. That this defendant admits the matters contained in paragraphs II and IV of the Complaint, reserving the right to object to their relevancy and accuracy after comparison with the original documents.

COUNTERCLAIM AND CROSS-CLAIM

Defendant Union Oil Company of California, for its counterclaim against the plaintiff and its cross-claim against all defendants herein, alleges and states:

1. That this defendant is the owner of three valid and subsisting oil and gas leases from the State of Oklahoma, as lessor, to this defendant, as lessee, all of which are dated November 16, 1965, and cover the natural bed of the Arkansas River below the high water mark, insofar as

such bed lies within Sections 16, 20 and 30, Township 10 North, Range 26 East, LeFlore and Sequoyah Counties, State of Oklahoma. That the oil and gas lease covering lands in said Section 16 is subject to a farmout agreement by and between this defendant and defendant Stephens Petroleum Company.

2. That this defendant is the owner of a valid and subsisting oil and gas lease from the State of Oklahoma, as lessor, to defendant Humble Oil & Refining Company as lessee, which lease is dated July 12, 1961, and covers the natural bed of the Arkansas River below the high water mark insofar as such bed lies within Section 32, Township 10 North, Range 25 East, LeFlore and Sequoyah Counties, State of Oklahoma, which oil and gas lease is subject to bear an overriding royalty of 1/8th of 7/8ths of total production, which overriding royalty interest is owned by defendant Humble Oil & Refining Company.

3. That the purported claim of plaintiff is without merit and constitutes a cloud on the title of this defendant; that the claims of all defendants herein in and to the above described premises are inferior and subject to the oil and gas leasehold estate of this defendant.

WHEREFORE, defendant Union Oil Company of California prays that plaintiff take nothing by reason of its Complaint and that this defendant, by reason of its counterclaim and cross-claim, have judgment herein quieting its title as above set forth against all parties hereto, and for such other and further relief as the Court may deem just and reasonable.

WALKER & WATSON

By /s/ H. B. Watson, Jr.

Attorneys for Defendant
Union Oil Company of California

[Filed, February 1, 1967]

ANSWER OF DEFENDANT PAN AMERICAN PETROLEUM CORPORATION

1. Defendant, Pan American Petroleum Corporation, admits the allegations contained in Paragraphs I, II and IV of the Complaint.

2. Said defendant denies the allegations contained in Paragraphs III, V and VI of the Complaint.

3. Answering Paragraph VII of the Complaint, this defendant states that it owns Oil and Gas Mining Lease dated February 8, 1966, purchased from the Commissioners of the Land Office of the State of Oklahoma, acting for and on behalf of the State of Oklahoma, which lease covers the Arkansas River bed insofar as such bed lies within Section 15, Township 9 North, Range 25 East, LeFlore and/or Sequoyah Counties, Oklahoma, and contains fifteen (15) acres, more or less, that said lease was purchased for valuable consideration, in good faith, in reliance of the ownership thereof by the State of Oklahoma; that this defendant is not fully informed as to whether various persons, firms and other corporations have similarly purchased leases covering other portions of the Arkansas River bed and therefore neither admits nor denies the same, that said defendant denies the remaining allegations of Paragraph VII.

That the purported claim of plaintiff herein is without merit and constitutes a cloud on the title of the defendant as such lessee of the State of Oklahoma.

WHEREFORE, defendant, Pa
Corporation, prays that plaintif
Complaint, and that judgment
fendant for such relief as the Co

American Petroleum
e nothing under its
entered for said de-
eems proper.

PAN AME
CORPO
AN PETROLEUM
By /s/ J. HON
Harry C
P. O. B
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ty, Oklahoma 73101

[Filed, February 1, 1967]

ANSWE

Jeffrey Sand Company, an A
its principal office in the city
for its answer to the complaint

s corporation with
t Smith, Arkansas,
states:

1. This defendant admits the
as alleged in Paragraph I of t
Section 18 of the Act of April
as construed in *Choctaw and C*
193 F.2d 456, and this defend
diction of this Court under 28
a matter which arises under cert
United States as set out in P
plaint.

ction of this Court
mplaint and under
906 (34 Stat. 137)
w Nations v. Seitz,
rther invokes juris-
.., Section 1331, as
s and treaties of the
h II of the Com-

2. This defendant admits the matters contained in Paragraphs II and IV of the Complaint, reserving the right to object to their relevancy and accuracy after comparison with the original documents.

3. This defendant specifically denies the allegations contained in Paragraphs III, VI, and VII.

COUNTERCLAIM

This defendant alleges that upon the admission of Oklahoma into the Union, the title to the bed of the Arkansas River below high-water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkansas River was navigable and that part of the river bed described in plaintiff's Complaint is now and has been since Oklahoma was admitted to the Union the property of the sovereign State of Oklahoma.

This defendant further alleges that it is the owner of two valid sand and gravel leases dated May 28, 1963, and July 28, 1964, purchased for valuable consideration from the State of Oklahoma, covering the natural bed of the Arkansas River below high-water mark insofar as such bed lies within Sections 1, 2, 12 and 13, Township 12 North, Range 20 East, and Sections 7, 17, 18, 19, 20, 28 and 29, Township 12 North, Range 21 East, situated in Muskogee and Sequoyah Counties, and Sections 8, 9, 10, 11, 17, 18, 19 and 20, Township 10 North, Range 24 East, and Sections 25, 35 and 36, Township 10 North, Range 25 East, and Sections 19, 20, 21, 25, 26, 27 and 28, Township 10 North, Range 26 East, situated in LeFlore and Sequoyah Counties, Oklahoma.

This defendant further alleges that the purported claim of plaintiff Cherokee Nation is without merit and constitutes a cloud on the title of the State and on the title of this defendant as lessee of the State of Oklahoma.

WHEREFORE, this defendant prays that plaintiff take nothing by reason of its Complaint, and that this defendant by reason of its Counterclaim have judgment herein quieting its leasehold title to the bed of the Arkansas River as described in the Complaint, insofar as such bed lies within the above described sections, and for the possession thereof, and for such other and further relief as the Court may deem just and proper.

JEFFREY SAND COMPANY

By Warner, Warner, Ragon & Smith
214 North Sixth Street
Fort Smith, Arkansas 72901

By /s/ H. P. Warner
Its Attorneys

[Filed, February 1, 1967]

ANSWER OF DEFENDANT, EASON OIL COMPANY

I.

Defendant, Eason Oil Company, a corporation, for answer to the complaint filed herein, states:

1. Defendant is without knowledge of the allegations of Paragraphs I and II thereof; therefore denies same and demands proof thereof.

2. Defendant denies the allegations of Paragraphs III, V, and VI thereof.

3. Defendant denies that the allegations of Paragraph IV are material herein.

4. As regards Paragraph VII, answering defendant alleges that it is a corporation, that it purchased an oil and gas lease from the Commissioners of the Land Office of the State of Oklahoma, dated November 10, 1964, recorded in book 436, page 151 of the records of the County Clerk of LeFlore County, Oklahoma, a copy of which is attached hereto, marked Exhibit "A", and made a part hereof by reference; that the leased premises are shown on the plat attached hereto, marked Exhibit "B", and made a part hereof. Answering defendant alleges that said lease is a valid lease and superior to any claim which plaintiff might have in or to the leased premises.

5. Answering defendant further alleges that the property which it has under lease from the Commissioners of the Land Office is a portion of the bed of the Arkansas River, a navigable river, which was abandoned by avulsion; that the title thereto remained in the State of Oklahoma, and that answering defendants lease is therefore valid and subsisting, and superior to any claim of the plaintiff or any defendant herein, with the exception of the State of Oklahoma, and Commissioners of the Land Office.

WHEREFORE, defendant, Eason Oil Company, a corporation, prays that plaintiff take nothing as against this defendant by reason of its complaint, and that answering defendant recover its costs herein.

JAY R. BOND
Ross, Holtzendorff & Bond
1619 First National Building
Oklahoma City, Oklahoma 73102

Attorneys for Defendant,
EASON OIL COMPANY, A
CORPORATION

Tract No. 11
11-9-1964 Sale
Lease No. 40 & 68-CS-10149

Received
November 18, 1964
Land Office

EXHIBIT A

THE STATE OF OKLAHOMA
OIL AND GAS MINING LEASE

THIS LEASE, Made and entered into in duplicate, on this 10th day of November, A.D., 1964, by and between the Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, parties of the first part, hereinafter designated as lessor, and Eason Oil Company, party of the second part, hereinafter designated as lessee, whose post office address is P. O. Box 9755, Oklahoma City, Oklahoma. Under and in pursuance of the provisions of the Constitution and Laws of the State of Oklahoma relating to the segregation of the oil and gas deposits and leasing thereof on school and other public lands belonging to the State of Oklahoma, WITNESSETH:

1. The Lessor, for and in consideration of twelve thousand six hundred sixty six dollars and fifty four cents ($12,666.54) DOLLARS, the receipt of which is hereby acknowledged, and the rents and royalties to be paid, and the covenants, stipulations and conditions to be observed and performed as herein set forth, does hereby demise, lease and let unto the lessee for a term of five (5) years from the date hereof and as long thereafter as oil or gas or either of them is produced in paying quantities, the following described tract(s) of land situated in the County of LeFlore and Sequoyah Counties, in the State of Oklahoma, to-wit:

That part or portion of Section 4, located in the Arkansas River Bed containing the approximate acreage set out below, Section 4, 9N-25E

containing 114 acres, more or less, and does hereby grant to the lessee the exclusive right and privilege to prospect and drill for, mine and extract all of the oil and natural gas deposits in or under said land, together with the right to pipe, store, and remove oil and natural gas and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil, distillate, and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owner or lessee, and also the right to use, free of cost, oil, gas and casinghead gas for fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to deliver or cause to be delivered to the Commissioners of the Land Office of the State of Oklahoma, or their successors, without cost into pipe lines, a royalty of one-eighth (1/8) part of the oil or gas produced from the leased premises and a one-eighth (1/8) part of all casinghead or drip gas or gasoline or other hydrocarbon substances produced from any well or wells on said premises, or in lieu thereof, pay to lessor the market value thereof, as the Commissioners may elect; provided, however, the royalty due and payable under this lease shall not in any event be less than Two Dollars and Fifty Cents ($2.50) per acre as specified in Paragraph 3 of this contract. The lessee shall furnish to the lessor certified copies of gauge tickets, sales, shipments, and amounts of gross production, at its office in Oklahoma City, Oklahoma. Gas is to be metered on the premises under pressure of 4 ounces above an assumed atmospheric pressure of 14.4 pounds per square inch at a temperature of 60 degrees Fahrenheit, or computed to that measurement.

3. Commencing at the first anniversary of the date of this lease after the completion of a well or wells producing or capable of producing oil or gas in paying quantities, lessee shall pay to lessor a royalty of not less than Two Dollars and Fifty Cents ($2.50) per acre per year, due and payable annually on or before the 25th day of the month following the end of each twelve months period thereafter during the life of this lease, provided that if oil or gas is being produced and taken from the leased premises and the royalty paid by the lessee thereon is less than the minimum royalty above specified, the difference between the amount so paid during any twelve months period between anniversaries of the date of the lease and the minimum annual royalty of Two Dollars and Fifty Cents ($2.50) per acre shall be paid by lessee to lessor on or before the 25th day of the month following the end of the yearly period in which such minimum royalty has accrued. Provided, further, that nothing herein shall be construed to excuse the commencement of production and marketing of oil or gas from the leased premises and the continuation of such production and marketing as required by other provisions of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on the land covered by this lease, and shall drill a sufficient number of wells to directly offset the wells upon adjoining contiguous premises, said offset wells to be commenced within sixty (60) days after commencement of marketing from the well upon such adjoining contiguous premises unless a longer time is prescribed by notice in writing from the lessor, and be prosecuted diligently and continuously until completed; and the said lessee shall operate the leased premises for oil and gas to the same extent as individual and corporate premises are being operated within the general oil and gas fields where such land is located, and failure to

faithfully comply with this provision shall be cause for forfeiture of this lease to the State.

5. At least one well producing oil or gas in paying quantities shall be drilled and completed within one year from the date hereof, or failing so to do this lease shall terminate as to both parties, unless the lessee on or before the expiration of said one year period shall pay to the lessor, at its office in the State Capitol Building, Oklahoma City, Oklahoma, the sum of One Dollar ($1.00) per acre for the privilege of delaying the drilling and completion of such a well for an additional year. In like manner and upon like payments the completion of a well producing oil or gas in paying quantities may further be deferred for like periods successively not exceeding five (5) years from the date hereof, it being understood that the completion of a well producing oil or gas in paying quantities during the life of this lease shall relieve the lessee of all future liability for said One Dollar ($1.00) per acre rent hereunder, but the lessee shall nevertheless remain obligated to drill an offset, or necessary offsets, and other wells necessary to the proper development and operation of said lease as herein otherwise provided, until the lease is fully developed; and provided, further, that unless a well producing oil or gas in paying quantities is completed on the above described premises within five (5) years from the date hereof, this lease shall be void.

6. The lessee shall carry on the development and operation in a workmanlike manner, commit no waste on said land, and suffer none to be committed upon the portion of his occupancy or use; take good care of the soil, and promptly surrender and return the premises upon the termination of this lease to the lessor, or to whomsoever shall be lawfully entitled thereto, unavoidable casualty only excepted.

7. All tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells, shall remain the property of the lessee, and may be removed at any time prior to or at the termination of the lease by forfeiture or otherwise; and the lessee shall not permit any nuisance to be maintained on the premises; and shall not use said premises for any purposes than those authorized in the lease; and before abandoning any well, shall securely plug the same so as to effectually shut off water from the oil-bearing stratum, and in the manner required by the rules and regulations of the Oklahoma Corporation Commission and the laws of the State of Oklahoma.

8. The lessee shall keep an accurate account of all oil and gas mining operations, including a log of each well drilled, duly sworn to by the contractor or driller, which shall be filed with the Secretary to the Commissioners of the Land Office within thirty (30) days after said well is completed. Accurate and reliable information concerning all wells and their operation and management shall be furnished to the Commissioners of the Land Office or their representatives upon demand. The said lessee shall also keep an accurate account showing the sales, prices, dates, purchases, and the whole amount of oil and gas mined or removed, and all sums due as royalties shall be a lien on the implements, tools and movable machinery or personal chattels used in operating said property, and also upon all the unsold oil and gas obtained from the land herein leased as security for the payment of said royalties.

9. The lessee shall be liable to the surface owner or surface lessee for all damages or loss accruing to the surface interests in said land, and to all crops and improvements thereupon, and appurtenances and hereditaments thereunto belonging by reason of the oil and gas

mining operations hereunder, and in the event the amount of such damage cannot be agreed upon by the lessee hereof and such surface owner or lessee then the amount of such damage shall be determined as is or may be provided by law. The lessee hereof further agrees to pay all such damages within ten (10) days after the amount thereof is determined, and the amount of such damages may be recovered from the lessee hereof and his sureties upon the bond given to secure the faithful performance of this lease.

10. This lease shall be subject to the constitution and laws of the State of Oklahoma and the rules and regulations of the Commissioners of the Land Office now or hereafter in force relative to such leases; all of which are made a part and condition of this lease; Provided, That no regulations made after the execution of this lease affecting either the length of the term hereof, the rate of royalty, or payment hereunder or the assignment hereof, shall operate to affect the terms and conditions of this lease.

11. No transfer or assignment of this lease or any part thereof, shall be valid, or convey any right in the assignee without the consent in writing of the Commissioners of the Land Office; and such assignee shall furnish a bond to the satisfaction of the Commissioners of the Land Office, conditioned for the faithful performance of the covenants and conditions of this lease, and pay the assignment fee.

12. Before this lease shall be in force and effect the lessee shall give a good and sufficient bond, to be approved by the Commissioners of the Land Office, for the faithful performance of this lease.

13. Upon the violation of any of the substantial terms or conditions of this lease, the Commissioners of the Land Office shall have the right at any time after hearing

upon fifteen (15) days notice, given by registered mail to the last known address of such lessee, specifying the terms or conditions violated, to declare this lease null and void, provided any person affected thereby may appeal to the district court of the county where the land is situated; and the said Commissioners for and on behalf of the State of Oklahoma, shall be entitled to recover from the lessee's bondsmen, all rents, royalties, charges, claims of every kind and nature due and owing and accruing and arising out of and by reason of this lease, on failure to comply with the provisions thereof, and the lessors shall be entitled and authorized to take immediate possession of the land.

14. It is further agreed that for any refinery of crude oil and its products and by-products, owned and controlled by the State of Oklahoma, the State shall have the preference right to purchase and receive the output from said premises at the market price thereof; Provided, that this clause shall not prevent the lessee from selling the output of said lease to any person, firm or corporation whatsover until notice in writing from the Commissioners of the Land Office shall be served on the lessee that the State is ready to take such oil and gas or either of them, and all sales of oil and gas or either of them under this proviso shall be valid and binding.

15. The lessee may at any time hereafter surrender and wholly terminate this lease upon payment of all liabilities then accrued and due hereunder, and may exercise such right by filing a formal relinquishment and release of the said lease with the Secretary to the Commissioners of the Land Office, Provided, that if such lease has been recorded in the county, the release thereof must be recorded in the county prior to filing with the Secretary to the Commissioners of the Land Office.

16. The surface owner or lessee of said premises shall have gas free of cost from any gas well on said premises

for use of principal dwelling thereon by making his own connection with the well.

17. If lessor herein owns a less interest in the minerals in the heretofore described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the lessor only in the proportion which its mineral interest bears to the whole and undivided fee.

In WITNESS WHEREOF, the parties hereunto subscribed their signatures on the day and year first above written.

Attest: THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA

/s/ (Illegible Signature) /s/ James M. Bullard
Secretary to the Commissioners of the Land Office.

ATTEST: EASON OIL COMPANY

/s/ F. Clark Lessee.

Assistant-Secretary. By /s/ T. Winston Eason, President.

STATE OF OKLAHOMA,
OKLAHOMA COUNTY,

Personally appeared before me, the undersigned Notary Public, within and for said County and State , James M. Bullard, to me known to be the person who subscribed the name of the Commissioners of the Land Office of the State of Oklahoma, to the foregoing instrument, as its Vice-Chairman, and acknowledged to me that he executed the same as his free and voluntary act and deed, and as free and voluntary act

and deed of such Commissioners of the Land Office, for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal on this 24th day of November, 1964.

My Commission expires 10-7-67

Kitty H. Eaves
Notary Public.

ACKNOWLEDGMENT FOR INDIVIDUAL

STATE OF OKLAHOMA,
COUNTY,

Personally appeared before me, the undersigned Notary Public, within and for said County and State , , to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal on this day of , 19 .

My Commission expires

Notary Public.

ACKNOWLEDGMENT FOR CORPORATION

STATE OF OKLAHOMA,
OKLAHOMA COUNTY,

Personally appeared before me, the undersigned Notary Public, within and for said County and State, T. Winston Eason, to me known to be the identical person who signed the name of the Lessee, Eason Oil Company to the above and foregoing instruments as its President, and acknowledged that he executed the same

as his free and voluntary act and deed, and as the free and voluntary act and deed of the said corporation for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal on this 17th day of November, 1964.

My Commission expires March 16, 1968.

Beatrice Gayman
Oklahoma City, Oklahoma
Notary Public.

EXHIBIT B

[Filed, February 1, 1967]

ANSWER OF LONE STAR PRODUCING COMPANY

The defendant Lone Star Producing Company, a corporation, for its answer to the complaint herein, avers and states:

1. This defendant admits the allegations contained in numerical paragraphs I, II and IV of said complaint.

2. This defendant denies the allegations contained in numerical paragraphs III, V and VI of the complaint.

3. Further answering, this defendant admits that many leases and other contracts covering portions of the Arkansas River Bed within the area involved in this action have been entered into in good faith by various persons, firms and corporation with the State of Oklahoma and the Commissioners of the Land Office of said state, as alleged in numerical paragraph VII of the complaint; but this defendant denies all other allegations of fact or conclusions set forth in such paragraph.

WHEREFORE, this answering defendant prays that the relief sought by the plaintiff herein be denied.

And this defendant prays that it have such other and further relief as the court may find and determine to be just, meet and proper in the premises.

GERALD R. JENKINS
301 South Harwood Street
Dallas, Texas

By /s/ O. L. Lupardus
Suite 510 Oklahoma Natural Building
Tulsa, Oklahoma 74119

Attorneys for said Defendant

[Filed February 1, 1967]

ANSWER

The State of Oklahoma, ex rel. G. T. Blankenship, Attorney General, answers the Complaint as follows:

I.

This defendant admits the jurisdiction of this Court as alleged in Paragraph I of the Complaint and under Section 18 of the Act of April 26, 1906 (34 Stat. 137) as construed in *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, and this defendant further invokes jurisdiction of this Court under 28 U.S.C.A., Section 1331, as a matter which arises under certain laws and treaties of the United States as set out in Paragraph II of the Complaint.

II.

This defendant admits the matters contained in Paragraphs II and IV of the Complaint reserving the right to object to their relevancy and accuracy after comparison with the original documents.

III.

This defendant specifically denies the allegations contained in Paragraphs III, V, VI, and VII of the Complaint.

COUNTER CLAIM

This defendant alleges that upon the admission of the State of Oklahoma into the Union, the title to the bed of the Arkansas River below high-water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkan-

sas River was navigable and that part of the river bed described in plaintiff's Complaint is now and has been since Oklahoma was admitted to the Union the property of the sovereign State of Oklahoma.

This defendant further alleges that the purported claim of plaintiff Cherokee Nation is without merit and constitutes a cloud on the title of the State of Oklahoma.

WHEREFORE, this defendant prays that plaintiff take nothing by reason of its Complaint and that this defendant by reason of its Counter Claim have judgment herein quieting its title to the bed of the Arkansas River as described in the Complaint, and for the possession thereof and for such other and further relief as the Court may deem just and proper.

STATE OF OKLAHOMA, EX REL
G. T. BLANKENSHIP,

Attorney General

By /s/ M. Darwin Kirk
Assistant to Attorney General

[Filed, February 1, 1967]

ANSWER OF HUMBLE OIL & REFINING COMPANY

COMES NOW Defendant Humble Oil & Refining Company, a Delaware corporation, and for answer to the Complaint filed herein, states:

I.

This Defendant admits the jurisdiction of this Court as alleged in Paragraph I of the Complaint under Section 18 of the Act of April 26, 1906 (34 Stat. 137) as construed in *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d

456, and this Defendant further invokes jurisdiction of this Court under 28 U.S.C.A., Section 1331, as a matter which arises under certain laws and treaties of the United States as set out in Paragraph II of the Complaint.

II.

This Defendant admits the matters contained in Paragraphs II and IV of the Complaint, reserving the right to object to their relevancy and accuracy after comparison with the original documents.

III.

This Defendant specifically denies each and every allegation contained in Paragraphs III, V and VI of said Complaint, except those allegations hereinafter specifically admitted.

IV.

In respect to Paragraph VII of said Complaint, this Defendant admits that it has acquired certain Oil & Gas Leases from the Commissioners of the Land Office of the State of Oklahoma acting for and in behalf of the State of Oklahoma covering portions of said Arkansas River bed, hereinafter more specifically described, in reliance on the force and effect of certain decisions of the Supreme Court of the State of Oklahoma, but this Defendant specifically denies all of the remaining allegations contained in said Paragraph VII relating to relief to which Plaintiff alleges it is entitled in this action.

COUNTER CLAIM

This Defendant alleges that upon the admission of Oklahoma into the Union, the title to the bed of the Arkansas River below high-water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkansas

River was navigable and that part of the river bed described in Plaintiff's Complaint is now and has been since Oklahoma was admitted to the Union the property of the sovereign State of Oklahoma.

This Defendant further alleges that it is the owner and holder of the following described valid Oil & Gas Leases now in full force and effect:

a. Lease dated November 16, 1965, executed by the Commissioners of the Land Office of the State of Oklahoma, as lessor, to Humble Oil & Refining Company, as lessee, covering the following described lands in LeFlore and/or Sequoyah Counties, Oklahoma, to-wit:

> That part or a portion of the following sections or parts of sections in the Arkansas River bed containing the approximate acreage set opposite the described sections in LeFlore and/or Sequoyah Counties, Section 28-10N-26E, containing 275 acres, more or less.

b. Oil & Gas Lease dated May 31, 1961, executed by the Commissioners of the Land Office of the State of Oklahoma, as lessors, to Humble Oil & Refining Company, as lessee, covering the following described land situated in Haskell and/or Sequoyah Counties, Oklahoma, to-wit:

> That part of the Arkansas river bed, Section 24-10N-23E, containing 204 acres, more or less, insofar as said lease covers all rights below the base of the Spiro Sand Formation in and under said land together with an overriding royalty of 1/8 of 7/8 of all oil, gas, casinghead gas, condensate and other minerals which may be produced from said land from the surface thereof down to the base of the Spiro Sand Formation.

Said lease is recorded in Book 202 at Page 760 in the records of Haskell County, Oklahoma, and in Book 266 at Page 339 in the records of Sequoyah County, Oklahoma.

c. Oil & Gas Lease dated July 12, 1961, executed by the Commissioners of the Land Office of the State of Oklahoma, as lessor, to Humble Oil & Refining Company, as lessee, covering the following described lands in LeFlore and/or Sequoyah Counties, State of Oklahoma, to-wit:

> That part of the Arkansas river bed, Section 32-1ON-25E, containing 136 acres, more or less, insofar as said lease covers all leasehold rights below the base of the Atoka Formation in and under said lands together with an overriding royalty interest of 1/8 or 7/8 of all oil, gas, casinghead gas and other minerals which may be produced from said land from the surface thereof down to the base of the Atoka Formation,

which said Oil & Gas Lease is recorded in Book 266 at Page 351 in the records of Sequoyah County, Oklahoma, and in Book 385 at Page 220 in the records of LeFlore County, Oklahoma.

This Defendant further alleges that the purported claim of Plaintiff Cherokee Nation is without merit and constitutes a cloud on the title of the State and on the title of this Defendant as lessee of the State of Oklahoma.

WHEREFORE, this Defendant prays that Plaintiff take nothing by reason of its Complaint and that this Defendant by reason of its Counter Claim have judgment herein quieting its leasehold title to the bed of the Arkansas River as described in the Complaint, insofar as such bed lies within the above described sections, and for the

possession thereof and for such other and further relief as the Court may deem just and proper.

HUMBLE OIL & REFINING COMPANY

2000 Classen Center North
Oklahoma City, Oklahoma 73106

By /s/ Albert C. McClain
Varley H. Taylor

Its Attorneys

[Filed, February 1, 1967]

ANSWER

Comes now Marathon Oil Company and for answer to the Complaint herein states:

1. This Defendant admits the jurisdiction of the Court as alleged in Paragraph I of the Complaint;

2. This Defendant admits the matters contained in Paragraph II and IV of the Complaint reserving the right to object to the relevancy and accuracy of such matters after examination of and comparison with the original documents;

3. This Defendant specifically denies the allegations contained in Paragraphs III, V, VI and VII of the Complaint.

COUNTER CLAIM

This Defendant alleges that upon the admission of the State of Oklahoma into the Union, the title to the bed

of the Arkansas River below the high water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkansas River was navigable and that part of the river bed described in Plaintiff's Complaint is now and always has been since Oklahoma was admitted to the Union the property of the sovereign State of Oklahoma.

This Defendant further alleges that it is the owner of a certain oil and gas mining lease dated November 16, 1965, purchased for valuable consideration from the State of Oklahoma covering the bed of the Arkansas River below the high water mark, insofar as said bed lies within Section 35, Township 10 North, Range 25 East, in LeFlore and/or Sequoyah Counties, Oklahoma.

This Defendant further alleges that it is the owner of other interests in land lying within the lands described by Plaintiff's Complaint and that said interests were purchased for valuable consideration from the record title owners of said interests as shown by the official land records of the counties wherein said interests are situated within the State of Oklahoma.

This Defendant further alleges that the purported claim of Plaintiff, Cherokee Nation, is without merit and constitutes a cloud on the title of the State of Oklahoma and on the title of this defendant as lessee of the State of Oklahoma, and as lessee of other record title owners of lands within the State of Oklahoma.

WHEREFORE, this Defendant prays that Plaintiff take nothing by its Complaint and that this Defendant, by reason of its Counter Claim, have judgment herein quieting its leasehold title to the bed of the Arkansas River as described in said Complaint insofar as said bed lies within Section 35, Township 10 North, Range 25 East, State of Oklahoma, and insofar as Plaintiff's Complaint might cloud its title to other interests in land which it may

own in the lands described in Plaintiff's Complaint lying within the State of Oklahoma, and for quiet and peaceful possession thereof and for such other and further relief as the Court may deem just, equitable and proper.

MARATHON OIL COMPANY

By /s/ Riley B. Fell, Attorney

/s/ Eugene A. Hoefling, Attorney

/s/ David O. Cordell, Attorney

/s/ O. L. Hasty, Attorney

[Filed, February 2, 1967]

ANSWER

The Commissioners of the Land Office of the State of Oklahoma now answer the Complaint as follows:

1. These defendants admit the jurisdiction of the court as alleged in Paragraph I of the complaint.

2. These defendants admit the matters contained in Paragraphs II and IV of the complaint, reserving the right to object to their materiality, relevance and accuracy.

3. These defendants specifically deny the allegations of Paragraphs III, V, VI and VII.

Wherefore, having fully answered herein, these defendants pray that plaintiff take nothing by reason of its complaint.

THE COMMISSIONERS OF THE
LAND OFFICE OF THE STATE
OF OKLAHOMA

By /s/ Harvey H. Cody

/s/ N. A. Gibson

/s/ R. R. Williamson, Jr.

State Capitol, Okla. City, Okla., 73105
Their Attorneys.

[Filed, February 3, 1967]

MOTION FOR LEAVE TO AMEND COMPLAINT

Comes now the plaintiff and moves the Court for an order permitting it to amend the complaint by interlineation to correct a clerical error and to show the true name of one of the defendants as Lone Star Producing Co. in lieu of the present description of said defendant as Lone Star Production Co.

Cherokee Nation or Tribe of Indians
in Oklahoma

By /s/ Andrew Wilcoxen
114 North 5th St.,
Muskogee, Oklahoma.

Attorney for Plaintiff.

[Filed, February 3, 1967]

ORDER

Now on this 3rd day of February, 1967 on application of the plaintiff for leave to amend the complaint by interlineation to correct a clerical error in the description of one of the defendants, the Court being fully advised in the premises grants leave to amend said complaint by changing the name of one of the defendants from Lone Star Production Co. to Lone Star Producing Co. as in said application prayed.

/s/ Edwin Langley
Judge

[Filed April 28, 1967]

MOTION TO SUBSTITUTE PARTY DEFENDANT

The State of Oklahoma on the relation of Dewey F. Bartlett, Governor, shows to this Court:

1. That the State of Oklahoma ex rel G. T. Blankenship, Attorney General, filed its Answer and Counter Claim in this cause on February 1, 1967.

2. That it is appropriate to order the substitution of the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, for the State of Oklahoma ex rel G. T. Blankenship, Attorney General.

WHEREFORE, the Defendant, State of Oklahoma, prays that the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, be substituted for the State of Oklahoma ex rel G. T. Blankenship, Attorney General,

as a Defendant in this case, and that the title of this case be amended accordingly.

State of Oklahoma ex rel
Dewey F. Bartlett, Governor

By /s/ M. Darwin Kirk
Special Counsel
P. O. Box 1439
Tulsa, Oklahoma

[Filed, April 28, 1967]

ORDER FOR SUBSTITUTION

The Motion to Substitute Party Defendant filed by the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, by M. Darwin Kirk, Special Counsel, coming on to be heard, and it appearing to the Court that the substitution prayed for should be granted, accordingly,

IT IS ORDERED that the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, be substituted as a party defendant herein for the State of Oklahoma ex rel G. T. Blankenship, Attorney General, and that the title of this case be amended accordingly.

Dated this 28 day of April 1967.

By /s/ Edwin Langley
District Judge

[Filed, September 5, 1967]

MOTION TO CONSOLIDATE CASES AND MOTION FOR JOINT TRIAL OF COMMON QUESTION OF LAW AND FACT

A. Motion to Consolidate

The State of Oklahoma on the relation of Dewey F. Bartlett, Governor, shows to this Court:

1. That Case No. 6219–Civil and Case No. 6166–Civil, both involve only the question of title to the entire bed of the Arkansas River between high water marks from its junction with the Grand River downstream to the Arkansas state line, and both involve the same principal adverse claimants, to-wit: The Cherokee Nation, The Choctaw and Chickasaw Nations, and the State of Oklahoma, together with others claiming under the State of Oklahoma; and,

2. Cases 6219–Civil and 6166–Civil therefore in reality constitute but one case; and

3. The State of Oklahoma on the relation of Dewey F. Bartlett, Governor, is a party defendant in Case No. 6219–Civil, and has moved to intervene as a party defendant in Case No. 6166–Civil;

WHEREFORE, the Defendant, the State of Oklahoma, on the relation of Dewey F. Bartlett, Governor, prays that Cases No. 6219–Civil and No. 6166–Civil be consolidated under the provisions of Rule 42(a) of the Federal Rules of Civil Procedure so that they are thenceforth conducted to judgment as a single cause.

B. Motion For Joint Trial of Common Question of Law and Fact

The State of Oklahoma on the relation of Dewey F. Bartlett, Governor, shows to this Court:

1. That in all captioned cases, to-wit, Cases 5649–Civil, 6143–Civil, 6166–Civil, and 6219–Civil, a common mixed question of law and fact is at issue: the ownership of the bed of the navigable portion of the Arkansas River lying in Oklahoma at the time of Statehood; and,

2. That resolution of the foregoing question, which involves the interpretation of ancient Indian Treaties and surveys, will involve the introduction of numerous documents, many of which are voluminous and expensive to reproduce; and,

3. That a joint trial of this issue, the judgment in which would be binding in all captioned cases, would effect a substantial saving in time, money and effort on behalf of both the Court and the parties litigant;

WHEREFORE, the Defendant, the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, prays that the mixed question of law and fact at issue in all captioned cases, to-wit: the ownership of the bed of the navigable portion of the Arkansas River lying within Oklahoma at the time of Statehood, be decided at a joint trial under the provisions of Rule 42(a) of the Federal Rules of Civil Procedure, the judgment in which shall be binding in all captioned cases.

STATE OF OKLAHOMA on relation of
Dewey F. Bartlett, Governor
By /s/ M. Darwin Kirk
Special Counsel
P. O. Box 1439
Tulsa, Oklahoma

[Filed, September 8, 1967]

MOTION FOR PERMISSION TO INTERVENE

Come now the Choctaw Nation and the Chickasaw Nation and respectfully show to the court that the parties in the above entitled action each claim to be the owners in part or in whole of the bed and banks of the Arkansas River below the mean level of the high river mark upon said banks from a point on the said river in Muskogee County, Oklahoma, thence down the Arkansas River to the eastern boundary of the State of Oklahoma.

These movants claim to be the owner of the fee simple title to all of the above described real property.

These movants claim and the main action have a question of law or fact in common.

Wherefore, pursuant to Rule 24, these movants pray for leave to intervene in this action. There is attached hereto and made a part hereof a pleading setting forth the claim of the Choctaw Nation and the Chickasaw Nation for which intervention is sought.

THE CHOCTAW NATION AND
THE CHICKASAW NATION
By /s/ Lon Kile
Box 726
Hugo, Oklahoma
Their Attorney

[Filed, September 8, 1967]

ORDER

Upon motion it is by the court ordered that the Choctaw Nation and the Chickasaw Nation be and they

are hereby granted permission to intervene herein.

Dated this the 8th day of September, 1967.

By /s/ Edwin Langley
Judge

[Filed, September 8, 1967]

ANSWER AND REPLY OF THE CHOCTAW NATION AND THE CHICKASAW NATION

Come now the Choctaw Nation and the Chickasaw Nation, intervenors herein, and for answer and reply to the other parties to this action, allege and say:

I.

That the jurisdiction of this court is invoked under the applicable provisions of Section 18 of the Act of Congress of April 26, 1906 (34 Stat. 137), as the same has been construed by the Court of Appeals. Choctaw and Chickasaw Nations v. Seitz, 193 P.2d 456.

II.

That the Choctaw and Chickasaw Nations, intervenors above named, were originally domiciled and owned their separate tribal domain East of the Mississippi River; that under a treaty concluded at Doaks Stand on the Natchez Road in the State of Mississippi on October 18, 1820 (7 Stat. 210) all of the lands to which reference is herein made, were ceded by the United States to the Choctaw Nation as its domain west, in exchange for lands then owned by the said Choctaw Nation or Tribe of Indians in the State of Mississippi; that by virtue of the said treaty the Choctaw Nation thereupon became the owner of the tribal domain west, located in what was then the

Indian Territory and what is now a part of the State of Oklahoma; that thereafter and under the provisions of a treaty entered into between the Choctaw and Chickasaw Nations and the United States on the 27th day of January, 1827 (11 Stat. 572), and the consideration therein stipulated to be paid to the Choctaw Nation, the tribal domain originally ceded to the said Choctaw Nation became the jointly owned domain of both the Choctaw and Chickasaw Nations; and that under Departmental allocations the common domain has throughout the years been owned on the basis of three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation.

III.

That while individual allotments of land in severalty have, since the enactment by Congress of the Act of July 1, 1902 (32 Stat. 841) ratified as the Supplemental Treaty on September 25, 1902, been made to members of the Choctaw and Chickasaw Tribes of Indians, there has remained many tracts of land not selected as allotments and which are still owned by the Tribes; that said lands are commonly known and referred to as "unallotted lands"; that the lands involved in this action are known as unallotted lands of the Tribes.

The Choctaw Nation is the owner of an undivided three-fourths interest and the Chickasaw Nation is the owner of an undivided one-fourth interest in and to the following described real property situated in Haskell County, Sequoyah County and LeFlore County, Oklahoma, to-wit: the natural bed of the Arkansas River below the high water mark from the confluence of the Arkansas River with the Canadian River thence to the eastern boundary of the State of Oklahoma.

The other parties to this action are claiming some right, title, interest, lien, estate or equity in and to the said real property, the exact nature of which is unknown

to these intervenors, but these intervenors allege that none of the parties herein have any right, title, interest, lien, estate or equity of any kind whatsoever in and to the said real property or any part thereof.

Wherefore, these intervenors pray that the full, legal and equitable title in and to the said real property be quieted and confirmed in them and that the other parties to this action and each of them be required to answer herein and set up the nature and extent of their respective claimed interest in and to the said real property, and that upon the final hearing, such claimed interest be adjudged junior and inferior to the title of these intervenors and that the full, legal and equitable title in and to all of the said real property be quieted and confirmed in these intervenors and against all of the other parties herein, and that each of the other parties herein be forever barred and enjoined from claiming or asserting any right, title, interest, lien, estate or equity in and to the said real property, or any part thereof, adverse or hostile to these intervenors, and for their costs expended herein.

THE CHOCTAW NATION AND
THE CHICKASAW NATION
By /s/ Lon Kile
Box 726
Hugo, Oklahoma
Their Attorney

[Filed, September 25, 1967]

PRE-TRIAL ORDER

On January 13, 1967, a conference was held in these cases at which the legal, factual, and procedural issues and problems the cases have in common were discussed and considered. Subsequently, on January 17, 1967, the court entered a memorandum setting out the principle issues determined at the conference to have been raised

by the pleadings and authorizing the filing of briefs addressed thereto. Counsel for the parties, after reasonably necessary extensions of time therefor, submitted comprehensive and exhaustive briefs, and the cases were then set for further pre-trial and for oral argument on September 8, 1967. They are now before the court for entry of a pre-trial order controlling further proceedings.

The issues common to all of the cases are these:

1. The navigability of the Arkansas River in Oklahoma below its confluence with the Grand River.

2. The ownership of the bed of the Arkansas River below its confluence with the Grand River.

3. The effect of changes in the course of the Arkansas River upon riparian ownerships and upon ownership of the bed.

4. The immunity from suit of the Indian tribes involved, and the right of the State of Oklahoma to waive its sovereign immunity.

5. Jurisdiction of this court.

The cases are consolidated only for the purpose of entering this order resolving these issues, which will be filed as a pre-trial order in each case. Otherwise, the cases will be handled separately.

The claims of the parties which give rise to these issues are briefly stated below. Allegations in the pleadings presenting legal and factual issues not involved in the other cases and not resolved in this order are not included.

CASE NO. 5649–CHOCTAW & CHICKASAW NATIONS v. TIBBETTS, et al.

In this case the Nations seek to quiet title to two tracts of land in this district which they claim were never

allotted to individual members of the tribes pursuant to the Act of Congress of July 1, 1902 (32 Stat. 841), later ratified as a supplemental treaty on September 25, 1902. The land identified in the complaint as Tract 1 and more fully described as the W/2 of Lots 1 and 2 of Section 12, T9N, R25E, was a riparian property lying along the east bank of the Arkansas River as shown in the government survey of 1898. The property identified in the complaint as Tract 2, the full description of which need not be repeated here, is comprised of land which in 1898 was a part of the bed of the Arkansas River but which is now, because of a shift in the course of the river, dry and useable. The Nations demand possession of the tracts and compensation for their use by the defendants since 1946.

The basis upon which the Nations rest their claim to Tract 2, the river bed land, is the treaty concluded at Dancing Rabbit Creek in Mississippi on September 27, 1830 (7 Stat. 333), between the United States and the Choctaw Nation. Under the terms of the treaty the United States in exchange for the Choctaw tribal lands in Mississippi agreed to cede to the Nation as its domain west certain lands now comprising a part of the State of Oklahoma, and pursuant to the stipulation of the treaty the President of the United States issued a patent to the lands on March 23, 1842, following congressional authorization. The lands thus ceded became the jointly owned domain of both the Choctaw Nation and the Chickasaw Nation under the provisions of a treaty between the two tribes and the United States entered into on January 27, 1827 (11 Stat. 572). Both tracts involved in this suit, the Nations claim, were included in the lands ceded under the terms of the treaty for the reason that such lands included the Arkansas River in fee simple, without reservation or limitation.

The State of Oklahoma by Charles Nesbitt, Attorney General, for whom by order of the court there was later

substituted the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, asked and was granted leave to intervene as a defendant. In its answer and cross-complaint the State of Oklahoma denies the plaintiffs' claim to the old river bed, asserting that at the time Oklahoma was admitted to the Union the Arkansas River was navigable and that by reason thereof the State became the owner of the river bed and remains the owner although the river has shifted to another area. The State demands that its title be quieted.

The defendant Robert G. Carter by his answer and cross-complaint denies the ownership claims of the Nations to the two tracts, and alleges ownership in himself. The portion of the former river bed included in Tract 2 and the property comprising Tract 1 have both been added to his property, he claims, which in the hands of his predecessors in title lay along the west bank of the river opposite Tract 1, by accretion through the gradual movement of the river to the east, so that it has completely vacated its former bed and passed almost entirely over Tract 1. He also denies the navigability of the Arkansas River at this juncture and demands strict proof.

The defendant Tom Frank Tibbetts, individually and as Executor of the Estate of Ella M. Tibbetts, deceased, having been substituted by order of the court for the defendant Ella M. Tibbetts, claims that the E/2 of Lots 1 and 2 of Section 12, T9N, R25E, was allotted to Ella M. Tibbetts by the plaintiffs as a member of the Choctaw Nation; that thereafter the river gradually moved to the east, engulfing within the stream the W/2 of Lots 1 and 2 by 1927, with land being added to the land on the west side of the river; that land thus added was in existence in 1936, at which time Ella M. Tibbetts went into possession of both the east and west half of Lots 1 and 2 which had thus been restored; that Ella M. Tibbetts had been claiming and using such land since

1936 and claimed title by prescription; and that he is now the owner as the sole devisee of Ella M. Tibbetts, deceased.

CASE NO. 6143–
STATE OF OKLAHOMA v. SUN OIL CO., et al.

This is a suit by the State of Oklahoma to quiet its title to land which formerly constituted the bed of a section of the Arkansas River in this district and which, it is alleged, was left dry when the river course was diverted by dams and jetties constructed for that purpose by the U. S. Corps of Engineers. It is the State's position, and that of intervening parties claiming interests through the State, that the Arkansas River is a navigable stream, that the State became the owner of the river and its bed upon admission to statehood on November 16, 1907, and that it continued to be the owner of the old bed when the river was diverted to a new course. The defendants, owners of pertinent riparian properties before the change in the river, and persons claiming interests through them, deny the State's claim, asserting ownership in themselves of the river bed. The Choctaw and Chickasaw Nations have intervened by leave of court, claiming ownership of the former river bed on the same grounds alleged in Case No. 5649.

CASE NO. 6166, CHOCTAW &
CHICKASAW NATIONS v. CHEROKEE NATION

The Choctaw and Chickasaw Nations have sued the Cherokee Nation to quiet the title to the bed of the Arkansas River in them throughout its course as the northern boundary of the lands ceded to the Choctaws by the United States in the treaty at Dancing Rabbit Creek in Mississippi on September 27, 1830. Title is asserted to the bed of the river as it existed in 1898 and also as it exists at present where the change from the former bed was by gradual action, together with any

land in between. The basis for the claim is the same as that set out in Case No. 5649: that this stretch of the Arkansas River was included in the lands ceded to the Choctaws, that the river is navigable, and that the bed was not included when the Choctaw lands were allotted to members of the tribe. The case is now pending on the motion of the Cherokee Nation to dismiss for the reason that the suit was not authorized by Congress and the Cherokee Nation is therefore immune from such action.

CASE NO. 6219, CHEROKEE NATION v. STATE OF OKLAHOMA, et al.

The Cherokee Nation in this action lays claim to the Arkansas River in Oklahoma below the mouth of the Grand River and demands an accounting for and the payment of all proceeds received by the State for oil and gas and other leases covering the bed of the Arkansas River below its confluence with the Grand. The tribe claims this portion of the river is navigable, that it acquired title to the river in fee simple by the terms of its treaty with the United States of 1833, that the river has never been allotted to individual members of the tribe, and that the State of Oklahoma does not now and never has owned any part of the river bed and has no interest which it could lease for oil or gas or other purposes. The Nation also demands all future rentals or royalties due under such leases. The State of Oklahoma and the defendants claiming interests through the State deny the plaintiff's claim, asserting title in the State, and in their counter-claim demand that their title and interest be quieted against the Cherokee Nation.

After reviewing the files and reading the excellent briefs prepared by counsel for the parties, and considering the matter thoroughly, including the oral arguments of counsel, the court has reached the conclusions hereinafter set out with respect to the issues here involved.

1. Navigability.

The dominant issue in all of these cases, and upon which the others hinge in the main, is the navigability of the Arkansas River from its confluence with the Grand River in Muskogee County in this district to the eastern boundary of Oklahoma, a question of fact. It is the conclusion of the court as to this issue, arrived at from documents, records, reports, and articles made and filed or published contemporaneously with the pertinent times, and from published books and research material written by students of the area and the period, all of which are as readily available to the court as to the parties, that it was common knowledge in the legal sense that from at least as early as 1824 until sometime after November 16, 1907, the Arkansas River in its natural state was a navigable river below its confluence with the Grand River, regularly used throughout the remainder of its course in what is now Oklahoma as a highway of commerce during the major portion of each year. Accordingly, it is the decision of this court, based upon judicial knowledge alone and without taking evidence, that this stretch of the Arkansas River was navigable in fact and in law at the time the western domains, now a part of Oklahoma, were ceded to the Choctaw Nation and to the Cherokee Nation, and at the time the treaties were made pursuant to which the lands were ceded, and also at the time Oklahoma was admitted to statehood on November 16, 1907.

2. Ownership of the River Bed.

The parts of the treaties between the United States and the Choctaw Nation and the Cherokee Nation which require construction by the court to determine the validity of their respective claims to the Arkansas River are set out in the pleadings and in the briefs submitted by counsel. After considering these and the arguments of counsel relating thereto, the court has concluded that as

a matter of law regardless of the area properly included within the boundary descriptions of the tribal domains of the Choctaws and the Cherokees in what is now Oklahoma, it was not the purpose or intent of the United States to convey to either tribe ownership of any part of the Arkansas River below its confluence with the Grand River, and that no provision of any treaty with either tribe and no act of Congress or patent issued to the tribes had this effect. This section or part of the Arkansas River became the property of the United States following the Louisiana Purchase in 1803 and remained the property of the United States until Oklahoma was admitted to the union. At that time it became the property of the State of Oklahoma by operation of law, subject to the easement or other right of the United States to do all things required to maintain or restore the river as a navigable stream and to control its use as a highway of commerce.

3. **Effect of River Movement.**

It appears from the pleadings and is assumed by counsel in their briefs that since 1907 there has been considerable shifting in the course of the Arkansas River, generally gradually and imperceptibly but sometimes suddenly, by avulsion. Actually, this is a matter of common knowledge in these parts. It is well established in Oklahoma, and this court holds, that when the change has been gradual the ownership of the bed and the navigation easement of the United States has moved with the river, riparian owners gaining or losing ground depending upon the direction of the movement. The law is also well established that an avulsive change produces no change in riparian ownership. The court is of the view that this principle applies to the ownership of the river bed as well. Where there has been an avulsive change in the river since 1907, therefore, the navigation easement of the United States has followed the new course of the river, the new bed has remained the property of the owner

before the change, and the old bed, wherever it was at the time the change occurred, has remained the property of the owner of the land over which the river flowed, the State of Oklahoma or others, depending on whether there had been earlier avulsive changes.

4. Sovereign Rights.

A question of sovereign rights runs through all of these cases, but no serious dispute appears to exist about them except as to the right of the Choctaw and Chickasaw Nations to maintain their action against the Cherokee Nation. The Choctaw and Chickasaw Nations, the Cherokee Nation, and the State of Oklahoma are all clearly authorized under the law to institute actions of the kind here involved. It is equally clear that the State of Oklahoma is empowered to waive its sovereign immunity from such suits against it and that the Indian tribes are not. These tribes may be made parties defendant in an action only to the extent and for the purpose authorized by Congress, and no such authority exists for any such suit against them. This immunity from suit and lack of authority to waive immunity obtains, in the opinion of the court, where the suit is by one tribe against another as effectively to preclude such suit from being maintained as it does to preclude suit against a tribe by an individual or by the State. Where an Indian nation intervenes in a suit to assert a claim, however, as the Choctaw and Chickasaw Nations have done in Case No. 6143, State v. Sun, it is in the case for all purposes. But under this ruling the order allowing the State to intervene against the tribes in Case No. 5649 was improvidently entered.

5. Jurisdiction.

Except to the extent that sovereign immunity precludes maintaining suit, the court is satisfied that it has

jurisdiction over the subject matter and the parties in these actions. With all rights asserted by the plaintiffs in the suits resting on the navigable character of the Arkansas River, long held to be a federal question, and with all property involved in the controversies within this district, this is the proper court for resolution of the differences giving rise to the suits.

In accordance herewith, orders should be entered for the disposition or further proceedings in each of the cases as follows:

The motion to dismiss in Case No. 6166, Choctaw and Chickasaw Nations v. Cherokee Nation, should be granted and the action dismissed. In Case No. 6219, Cherokee Nation v. State, judgment in favor of the defendants and against the plaintiff should be entered upon the pleadings. The remaining cases, No. 5649, Choctaw and Chickasaw Nations v. Tibbetts, and No. 6143, State v. Sun, should be set separately for further pre-trial and other hearings that may be necessary in preparation for trial to determine the nature and extent of the river movement alleged in the pleadings and the effect thereof on the ownership interests of the parties, together with other pertinent issues not herein resolved.

In the opinion of the court the conclusions herein, and the orders to be entered pursuant thereto, involve controlling questions of law as to which there is substantial ground for difference of opinion, and an appeal therefrom may in each case materially advance the ultimate termination of the litigation. For that reason, further proceedings in these cases will be stayed pending resolution of the issues on appeal from this order, if allowed and taken.

/s/ Edwin Langley
District Judge

[Filed, October 4, 1967]

MOTION TO CORRECT PRE-TRIAL ORDER

Come now the Choctaw Nation and the Chickasaw Nation and respectfully show to the court that they have heretofore moved the court for leave to intervene in this case. At the pretrial conference on September 8, 1967, the court granted the motion and allowed the Choctaw Nation and the Chickasaw Nation to intervene.

The order of the court filed September 25, 1967 reflecting the proceedings had at that conference did not show that the Choctaw Nation and the Chickasaw Nation were allowed to intervene and to file the answer which was attached to their motion to intervene.

Wherefore, the Choctaw Nation and the Chickasaw Nation respectfully pray the court to correct its order of September 25, 1967, reflecting the proceedings had in said pretrial by showing that the Choctaw Nation and Chickasaw Nation were granted permission to intervene and file the answer which was attached to their motion to intervene.

/s/ Lone Kile
Box 726
Hugo, Oklahoma

Attorney for the
Choctaw Nation and
the Chickasaw
Nation

[Filed, October 10, 1967]

AMENDMENT TO PRE-TRIAL ORDER

The pre-trial order entered herein on September 25, 1967, to the extent applicable to this case is amended as follows:

The Choctaw and Chickasaw Nations have by leave of court filed a petition in intervention alleging ownership in the Arkansas River bed below the high water mark from the confluence of the Arkansas River with the Canadian River to the eastern boundary of the State of Oklahoma adversely to the claim of the Cherokee Nation to this portion of the river and adversely to the claims of the defendants.

For the reasons set out in the pre-trial order, the court is of the opinion that the claim of these tribes to this portion of the Arkansas River bed is without merit and that judgment in favor of the defendants and against the intervenors should be entered upon the pleadings.

/s/ Edwin Langley
District Judge

THIRTY-THIRD DAY, SEPTEMBER TERM, WEDNESDAY, OCTOBER 25th, 1967.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth and Honorable John J. Hickey, Circuit Judges.

* * *

THIRTY-THIRD DAY, SEPTEMBER TERM, WEDNESDAY, OCTOBER 25th, 1967.

These causes came on to be heard on application for an interlocutory appeal from the United States District Court for the Eastern District of Oklahoma in the above entitled matters.

On consideration whereof, it is now here ordered by this court that the said application for interlocutory appeal be and the same is hereby denied.

[Filed, November 15, 1967]

JUDGMENT

In accordance with the pre-trial order entered herein on September 25, 1967, and the amendment thereto entered October 10, 1967, and for the reasons therein stated, the court is of the opinion, and so finds, that no grounds exist upon which there can be granted the relief prayed for by the plaintiff, The Cherokee Nation, or by the intervenors, the Choctaw and Chickasaw Nations, and that judgment should be entered against said Indian tribes and in favor of the defendants upon their counter-claims.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that upon being admitted to the union of states on November 16, 1907, the State of Oklahoma became by operation of law the owner of the lands comprising the bed of the Arkansas River between the high water banks from its confluence with the Grand River to the eastern boundary of Oklahoma, in the Eastern District of Oklahoma, said river being a navigable stream throughout this portion of its course, subject only to the right of the United States to maintain or restore the navigability of the river and to control its use as a highway of commerce between states; that against the Cherokee Nation and the Choctaw and Chickasaw Nations, now claiming ownership thereof as unalloted lands of their western domains, the title of the State of Oklahoma, and of all defendants herein claiming an interest through the State, is quieted and said tribes are barred and enjoined from asserting ownership or other claims adverse to said defendants; and that said Indian tribes have no right or interest in any money or other proceeds realized or which may be realized by the State of Oklahoma or the other defendants from the lease or rental or other use of said lands.

IT IS FURTHER ORDERED that each of the parties herein shall bear its own costs.

/s/ Edwin Langley
District Judge

[Filed, November 24, 1967]

MOTION FOR NEW TRIAL AND IN THE ALTERNATIVE MOTION TO OPEN THE JUDGMENT TO TAKE ADDITIONAL EVIDENCE

The Plaintiff moves that the judgment entered herein on the 15th day of November, 1967 be vacated and set aside and that a new trial be granted on the following grounds:

(1) That the Court was in error in concluding that upon being admitted to the Union of States on November 16, 1907 the State of Oklahoma became by operation of law the owner of the lands comprising the bed of the Arkansas River between the high water banks from its confluence with the Grand River to the eastern boundary of Oklahoma.

(2) That the Court was in error in the pretrial order of September 25, 1967 with respect to conclusion therein expressed concerning ownership of the bed of the Arkansas River.

(3) The Court erred in entering judgment for the defendants.

In the alternative the Plaintiff would show to the Court that in determining the title question involved herein and the intent and purpose of the parties to the Treaties between the United States and the Cherokee Nation which the Court declared to be the basis of

conclusion in the aforesaid pretrial order, there are a number of Government documents and State papers which were not included in or attached to briefs heretofore submitted by Plaintiff which Plaintiff believes essential to determination of such intent.

That failure to so attach these proposed exhibits was occasioned by Plaintiffs belief that at some time during proceeding and before judgment Plaintiffs would be afforded an opportunity to offer them into evidence. Plaintiffs did not, by brief heretofore submitted, attempt to, nor did it understand that it was required to include all such evidence.

WHEREFORE, Plaintiff prays that a new trial be granted and that in the alternative and in the circumstances and in view of the importance of the problem involved the Court will open the judgment and permit all parties to submit additional documentary evidence into the record.

THE CHEROKEE NATION, PLAINTIFF

By /s/ Earl Boyd Pierce
Andrew Wilcoxen
Joe Muskrat
Attorneys for Plaintiff

[Filed, November 27, 1967]

MOTION FOR NEW TRIAL AND IN THE ALTERNATIVE MOTION TO OPEN THE JUDGMENT TO TAKE ADDITIONAL EVIDENCE

The intervening defendants, Choctaw Nation and Chickasaw Nation move that the judgment entered herein on the 15th day of November, 1967 be vacated and set aside and that a new trial be granted on the following grounds:

(1) That the Court was in error in concluding that upon being admitted to the Union of States on November 16, 1907 the State of Oklahoma became by operation of law the owner of the lands comprising the bed of the Arkansas River between the high water banks from its confluence with the Grand River to the eastern boundary of Oklahoma.

(2) That the Court was in error in the pre-trial order of September 25, 1967 with respect to conclusions therein expressed concerning ownership of the bed of the Arkansas River.

(3) The Court erred in entering judgment for the defendants.

In the alternative the Intervening Defendants would show to the Court that in determining the title question involved herein and the intent and purpose of the parties to the treaties between the United States and the Indian nations which the Court declared to be the basis of conclusion in the aforesaid pre-trial order, there are a number of government documents and state papers which were not included in or attached to briefs heretofore submitted which are essential to determination of such intent.

That failure to so attach these proposed exhibits was occasioned by Intervening Defendants belief that at some time during proceedings and before judgment they would be afforded an opportunity to offer them into evidence. Defendants did not, by brief heretofore submitted attempt to, nor did they understand that it was required to include all such evidence.

Wherefore, Intervening Defendants pray that a new trial be granted and that in the alternative and in the circumstances and in view of the importance of the problem involved the Court will open the judgment and

permit all parties to submit additional documentary evidence into the record.

THE CHOCTAW NATION and
CHICKASAW NATION
Intervening Defendants

By /s/ Lone Kile
Hugo, Oklahoma
Attorney for Intervening
Defendants.

[Filed, December 4, 1967]

RESPONSE TO MOTION FOR NEW TRIAL AND MOTION TO OPEN JUDGMENT OF CHEROKEE NATION

Come now the defendants, State of Oklahoma, Commissioners of the Land Office of the State of Oklahoma, Eason Oil Company, Steve Gose, Humble Oil & Refining Company, Lone Star Producing Company, Marathon Oil Company, Mobil Oil Corporation, Skelly Oil Company, Southland Royalty Company, Tenneco Oil Company, and Union Oil Company of California, and respond to the Motion for New Trial and Motion to Open Judgment filed on behalf of the plaintiff, Cherokee Nation, as follows:

1. The judgment entered on November 15, 1967, which was in accordance with the pre-trial order entered in this cause on September 25, as amended by order entered October 10, 1967, was correct in all respects.

2. The judgment is not based upon evidence introduced by the parties, but solely upon the interpretation of treaties between the Cherokee Nation and the United States and between the Choctaw and Chickasaw Nations and the United States, the patents from the United States to each Nation, and matters concerning which the

court was entitled to take judicial notice. No other documents were then, or are now, necessary to support the judgment.

WHEREFORE, the above-named defendants request that the motion be denied.

FOR THE DEFENDANTS:
Eason Oil Company
Steve Gose
Humble Oil & Refining Company
Lone Star Producing Company
Marathon Oil Company
Mobil Oil Corporation
Skelly Oil Company
Southland Royalty Company
Tenneco Oil Company
Union Oil Company of California
Commissioners of the Land Office of the State of Oklahoma, and
State of Oklahoma ex rel Dewey F. Bartlett, Governor

By /s/ M. Darwin Kirk
Special Counsel
P. O. Box 1439
Tulsa, Oklahoma 74101

[Filed, December 4, 1967]

RESPONSE TO MOTION FOR NEW TRIAL AND MOTION TO OPEN JUDGMENT OF CHOCTAW AND CHICKASAW NATIONS

Come now the defendants, State of Oklahoma, Commissioners of the Land Office of the State of Oklahoma, Eason Oil Company, Steven Gose, Humble Oil & Refining Company, Lone Star Producing Company, Marathon

Oil Company, Mobil Oil Corporation, Skelly Oil Company, Southland Royalty Company, Tenneco Oil Company, and Union Oil Company of California, and respond to the Motion for New Trial and Motion to Open Judgment filed on behalf of the intervening plaintiff, Choctaw and Chickasaw Nations, erroneously referred to in their motion as intervening defendants, as follows:

1. The judgment entered on November 15, 1967, which was in accordance with the pre-trial order entered in this cause on September 25, as amended by order entered October 10, 1967, was correct in all respects.

2. The judgment is not based upon evidence introduced by the parties, but solely upon the interpretation of treaties between the Cherokee Nation and the United States and between the Choctaw and Chickasaw Nations and the United States, the patents from the United States to each Nation, and matters concerning which the court was entitled to take judicial notice. No other documents were then, or are now, necessary to support the judgment.

WHEREFORE, the above-named defendants request that the motion be denied.

FOR THE DEFENDANTS:
Eason Oil Company
Steve Gose
Humble Oil & Refining Company
Lone Star Producing Company
Marathon Oil Company
Mobil Oil Corporation
Skelly Oil Company
Southland Royalty Company
Tenneco Oil Company
Union Oil Company of California
Commissioners of the Land Office

of the State of Oklahoma, and
State of Oklahoma ex rel Dewey F.
Bartlett, Governor

By /s/ M. Darwin Kirk
Special Counsel
P. O. Box 1439
Tulsa, Oklahoma 74101

[Filed, December 29, 1967]

ORDER

This cause is before the court on the motion of the plaintiff, the Cherokee Nation, and the motion of the intervening defendants, the Choctaw and Chickasaw Nations, for a new trial or in the alternative to open the judgment to take additional evidence, and on the response thereto filed by the other defendants. After considering the matter fully, the court is of the opinion, and so finds, that the motions should be denied.

The pre-trial order entered on September 25, 1967, as amended by the order of October 10, 1967, and the judgment pursuant thereto filed November 15, 1967, are not based on evidence. The adjudication is simply that the treaties involved, viewed in the light of relevant court decisions, provide no basis for the movants' claims. The court has studied the treaties and pertinent decisions thoroughly in reaching its conclusions with respect to the rights of the Indian tribes and is satisfied that the taking of evidence is neither necessary nor appropriate, and that no useful purpose would be served in prolonging consideration of the questions involved at this level.

IT IS THEREFORE ORDERED that the motions be overruled and denied.

/s/ Edwin Langley
District Judge

[Filed, January 24, 1968]

NOTICE OF APPEAL

Notice is hereby given that the Choctaw Nation and the Chickasaw Nation, intervenors in the above styled and numbered action, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the order of the United States District Court for the Eastern District of Oklahoma entered on the 15th day of November, 1967, and the order by the United States District Court for the Eastern District of Oklahoma entered on the 29th day of December, 1967, overruling the motion of the Choctaw Nation and the Chickasaw Nation for a new trial or in the alternative to open the judgment to take additional evidence.

/s/ Lon Kile
Post Office Box 726
Hugo, Oklahoma
Attorney for the Intervenors
the Choctaw Nation and the
Chickasaw Nation

[Filed, January 29, 1968]

BOND FOR COSTS ON APPEAL

We the undersigned jointly and severally acknowledge that we are bound to pay the State of Oklahoma the sum of $250.00.

The condition of this bond is that whereas the intervenors the Choctaw Nation and the Chickasaw Nation have appealed to the United States Court of Appeals for the Tenth Circuit by notice of appeal filed on the 23rd day of January, 1968, from the judgment of this court

entered on the 15th day of November, 1967, and the order by the United States District Court for the Eastern District of Oklahoma entered on the 29th day of December, 1967, overruling the motion of the Choctaw Nation and the Chickasaw Nation for a new trial or in the alternative to open the judgment to take additional evidence, and if the intervenors the Choctaw Nation and the Chickasaw Nation shall pay all costs adjudged against them if the appeal is dismissed and the judgment affirmed or such cost as the appellate court may award if the judgment is modified, then this bond is to be void, but if the intervenors fail to perform this condition, payment of the amount of this bond shall be due forthwith.

THE CHOCTAW NATION

By /s/ Harry J. W. Belvin
Chief

THE CHICKASAW NATION

By /s/ Overton James
Governor

By /s/ Florene Kiles
Surety

I, Florene Kile, the undersigned surety on the above bond, upon my oath state that I am a resident householder and freeholder within the State of Oklahoma and have property within said State over and above my just debts and liabilities, exclusive of property exempt from execution, exceeding the value of $500.00.

/s/ Florene Kile

[Filed, January 25, 1968]

NOTICE OF APPEAL

Notice is hereby given that the Cherokee Nation or Tribe of Indians in Oklahoma, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the pre-trial order heretofore entered by this Court on the 25th day of September, 1967 and the judgment dated November 15, 1967, and the order of the Court denying and overruling the motion for new trial or in the alternative to open the judgment entered on December 29, 1967.

THE CHEROKEE NATION OR
TRIBE OF INDIANS IN OKLAHOMA, PLAINTIFF,
By /s/ Earl Boyd Pierce
Andrew Wilcoxen
Joe Muskrat
Attorneys for Plaintiff

[Filed, January 30, 1968]

THE CHEROKEE NATION

General Counsel

January 29, 1968

Honorable John B. Fink, Clerk
United States District Court
Muskogee, Oklahoma 74402

Re: 6219-Civil, The Cherokee Nation or Tribe of Indians in Oklahoma vs. The State of Oklahoma, et al.

BOND FOR COSTS

The undersigned, Earl Boyd Pierce of Muskogee, Oklahoma, hereby certifies that he is the General Counsel of

the Cherokee Nation or Tribe of Indians in Oklahoma, and is one of the Attorneys for Plaintiff in the above styled and numbered suit; that heretofore he has been duly authorized by the Principal Chief and Executive Committee of the Cherokee Nation to incur any reasonable and necessary expense in the prosecution of said suit to final conclusion; that a Cost Bond in the amount of $250 is required to be posted under the Federal Rules of Civil Procedure in the event of an Appeal, notice of which in the above case has already been filed, and said Attorney hereby certifies that all costs of said appeal which may hereafter be assessed against the said Cherokee Nation will upon demand be forthwith paid to the Office of the Clerk of this Court.

Witness my hand as such Attorney for the said Cherokee Nation or Tribe of Indians in Oklahoma and as General Counsel for said Nation on this 29th day of January, 1968.

/s/ Earl Boyd Pierce
General Counsel for the
Cherokee Nation and one
of the attorneys in the
above styled and numbered
cause.

cc: Honorable W. W. Keeler, Principal Chief
Mr. Ralph Keen, General Business Manager
Mr. Andrew Wilcoxen
Mr. Joe Muskrat
Mr. Jesse L. Ballard

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis, Circuit Judge.

The Cherokee Nation or Tribe of Indians in Oklahoma et al.,	)	
Appellants,	)	
9924-9925 vs.	)	Appeals from the United States District Court for the Eastern District of Oklahoma.
State of Oklahoma et al.,	)	
Appellees.	)	

ORDER

On consideration of appellees' motion to affirm, it is ordered that the said motion be and the same is hereby denied.

OPINION
OF THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Earl Boyd Pierce for appellant The Cherokee Nation. With him on the brief were Joseph Muskrat, Andrew C. Wilcoxen and Jesse L. Ballard.

Lon Kile for Appellants The Choctaw Nation and The Chickasaw Nation.

M. Darwin Kirk for the Appellees. With him on the brief were:

G.T. Blankenship, Attorney General, for the State of Oklahoma;

N.A. Gibson for Commissioners of the Land Office of the State of Oklahoma;

Jay R. Bond and Ross, Holtzendorff & Bond for Eason Oil Company;

Varley H. Taylor for Humble Oil & Refining Co.;

Robert W. Richards and S.M. Groom, Jr., for Mobil Oil Corporation;

Judson S. Woodruff, McAfee, Dudley, Taft, Cates & Mark and S.W. Wells for Skelly Oil Company;

H.B. Watson, Jr., and Walker & Watson for Union Oil Company of California and Steve Gose;

Frederick Dorwart and Holliman, Langholz & Runnels for Lone Star Producing Co.;

David O. Crodell, Eugene A. Hoefling, Riley B. Fell and Oscar L. Hasty for Marathon Oil Company;

Glenn R. Davis, Boesche, McDermott & Eskridge and Millard F. Carr for Tenneco Oil Company;

Dale Hinson, Robert L. Trimble and Hudson, Keltner, Smith & Cunningham for Southland Royalty Company;

W. Douglas Weisbruch for Lone Star Producing Co.

Roger P. Marquis for Amicus Curiae the United States. With him on the brief were Clyde O. Martz, Assistant Attorney General, and Frank B. Friedman, Attorney, Department of Justice.

Alpheus Varner for Amici Curiae Robert G. Carter, B.E. Cobb and Katherine Cobb Baker.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges. BREITENSTEIN, Circuit Judge.

This controversy concerns the ownership of the bed of the Arkansas River between its confluence with the Grand River[1] and the Oklahoma-Arkansas boundary. The Cherokees, Choctaws, and Chicakasaws claim under deeds for vast areas executed by the United States. Oklahoma says that under the equal footing-implied trust doctrine it received title to the beds of navigable streams upon its admission to the Union. The trial court's decision in favor of Oklahoma was made, without an evidentiary hearing, on the pleadings and matters of which it could take judicial notice. No party contends seriously that any evidence is needed or helpful.

The Cherokees sued Oklahoma and the holders of various sand, gravel, oil, and gas leases granted by Oklahoma and covering parts of the land in dispute. The relief sought was an accounting and an injuction. Oklahoma and various of its lessees counterclaimed for a decree quieting title in Oklahoma. The Choctaws and Chickasaws were permitted to intervene and assert their claims of ownership to a portion of the riverbed.[2]

All parties agree that the stretch of the Arkansas River with which we are concerned is navigable in fact.[3] From the mouth of the Grand to the confluence with the Canadian, the Arkansas flows through an area granted to the Cherokees. From the mouth of the Canadian to the

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[1] Sometimes known as the Neosho River and as the Neosho-Grand River.

[2] This is a joint claim. It is undisputed that the Choctaws have an undivided three-fourths interest and the Chickasaws an undivided one-fourth interest. See 11 Stat. 573; 11 Stat. 611; and Chickasaw Nation v. United States, 94 Ct. Cl. 215, 237. Hereinafter reference will be made only to the Choctaws.

[3] In Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86, the Supreme Court upheld a lower court finding that the head of navigation on the Arkansas was the mouth of the Grand.

state boundary, the river divides the lands of the Cherokees, which lie to the north, from the lands of the Choctaws, which lie to the south. The Choctaws claim that their title goes to the north bank of the Arkansas and the Cherokees dispute this. We find it unnecessary to consider this controversy between the Tribes.

The Tribes assert ownership by reason of deeds from the United States covering vast, undivided areas, the perimeters of which were described by metes and bounds. The deeds did not except the beds of navigable streams. The basic argument is that, as a simple matter of conveyancing law, title to all lands within the area vested in the Tribes. An understanding of the situation requires consideration of the circumstances in which the deeds were issued.

At the time of the independence of the United States, the Tribes occupied large areas of land in the South. Westward expansion caused increasing friction between the white settlers and the Indians. Georgia and other later formed states asserted jurisdiction over the Indians and their lands. Intolerable situations arose.[4] The states ignored efforts by the United States to protect and provide for the Indians through treaty and statute. The federal government, faced with growing strife among the Indians and the states, adopted the policy of resettling the Indians on lands to the west which were not then settled by whites.

The Cherokees were first given lands near the White River in what is now the State of Arkansas.[5] Emigration

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[4] Descriptions of the condition of the Indians are found in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1; Worcester v. Georgia, 31 U.S. (6 Pet.) 515; and Choctaw Nation v. United States, 119 U.S. 1.

[5] See Treaty of July 8, 1817, 7 Stat. 156, 158.

was slow, and new treaties were made, providing for resettlement of all the Cherokees on land west of the Mississippi to be deeded to the Indians by the United States. In turn, the Indians surrendered their lands east of the Mississippi.[6] The Cherokees were then moved to the new lands, but the voluntariness of their migration, and of their consent to the treaties, is doubtful.

The story of the Choctaws is much the same. Relocation of that Tribe from areas east of the Mississippi was made pursuant to the Treaty of Doak's Stand, October 18, 1820, 7 Stat. 210, and the Treaty of Dancing Rabbit Creek, September 27, 1830, 7 Stat. 333. The Choctaws gave up their lands in the East and received lands in the West.

The relocation of the Indians was made possible by the Louisiana Purchase of 1803,[7] in which the United States obtained the major portion of the western basin of the Mississippi River with the express intent that the inhabitants of the region "shall be incorporated in the Union of the United States."[8] Prior to relocation, however, the Cherokees and Choctaws desired protection from harrassment by state and territorial governments. To induce them to move across the Mississippi, the United States agreed in the Treaty of New Echota and in the Treaty of Dancing Rabbit Creek that no part of the land granted would be included in any state or terri-

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[6] See Treaty of May 6, 1828, 7 Stat. 311; Treaty of February 14, 1833, 7 Stat. 414; and Treaty of New Echota, December 29, 1835, 7 Stat. 478.

[7] Treaty of April 30, 1803, 8 Stat. 200.

[8] Id. at 202.

tory.[9] The patents issued to the Cherokees and to the Choctaws contained no exception or reservation relating to the beds of navigable streams. The lands granted were described by their exterior boundaries.

In the years that followed the situation of the Indians deteriorated.[10] New territories were created in the West and new states admitted into the Union. A number of these states were in regions where Indian treaties provided that no state or territory should be created.[11] The existence of an extensive area which was held by the Indians and in which private property was not recognized was a serious obstacle to the creation of the State of Oklahoma.[12] In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land,[13] and the allotment of land to the individual members of the tribes. The result was an agreement with

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[9] The Treaty of New Echota provided (Art. 5, 7 Stat. 478, 481) that the lands ceded "shall, in no future time without their [the Indians'] consent, be included within the territorial limits or jurisdiction of any State or Territory." The Treaty of Dancing Rabbit Creek provided (Art. IV, 7 Stat. 333, 334) that "no part of the land granted them [the Indians] shall ever be embraced in any Territory or State."

[10] Stephens v. Cherokee Nation, 174 U.S. 445, 450-460, contains an account of conditions existing in the tribal governments and mentions their corruption and irresponsibility.

[11] See e.g. Treaty with the Senecas and Shawnees of July 20, 1831, 7 Stat. 351, 353; Treaty with the Shawnee of August 8, 1831, 7 Stat. 355, 357; and Treaty with the Ottaway of August 30, 1831, 7 Stat. 359, 361.

[12] Choate v. Trapp, 224 U.S. 665, 667.

[13] 27 Stat. 612, 645.

the Cherokees[14] and with the Chocktaws[15] which nullified treaties inconsistent therewith and which provided for the allotment of the lands. These agreements were followed by the Act of April 26, 1906, 34 Stat. 137, which provided for final disposition of the affairs of the Five Civilized Tribes.[16] This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians.[17]

Oklahoma was admitted into the Union in 1907 upon compliance with the conditions of the Enabling Act[18] which provided that Oklahoma should be so admitted "on an equal footing with the orignal States,"[19] and on the agreement that it disclaim title "to all lands * * * owned or held by any Indian or Indian Tribes."[20] By statute[21] and by court decision[22] Oklahoma has consistently maintained the position that it owns the beds

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[14] 32 Stat. 716, 727.

[15] 32 Stat. 641, 656.

[16] These included the Chickasaws, Creeks, and Seminoles in addition to the Cherokees and the Choctaws.

[17] 34 Stat. at 148.

[18] Act of June 16, 1906, 34 Stat. 267.

[19] Id. at 271.

[20] Id. at 279.

[21] See 64 Okl.St.Ann. § 290; 60 Okl.St.Ann. § 337.

[22] State v. Nolegs, 40 Okl. 479, 139 Pac. 943; Vickery v. Yahola Sand & Gravel Co., 158 Okl. 120, 12 P.2d 881; City of Tulsa v. Commissioners of Land Office, 187 Okl. 82, 101 P.2d 246; and Lynch v. Clements, (Okl.) 263 P.2d 153.

underlying navigable streams. The present suit which questions that ownership was brought by the Cherokees nearly sixty years after statehood.

In Pollard v. Hagan, 44 U.S. (3 How.) 212, 230, the Court held that the Constitution did not pass title of the beds of navigable waters to the United States, but reserved title to the several states. Because new states enter the Union on an equal footing with all other states, title to the beds underlying navigable waters passes to the new states.[23] Shively v. Bowlby, 152 U.S. 1, 48, establishes the power of Congress to grant land below navigable water in a territory when it is necessary "to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce * * *, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." The decision in United States v. Holt State Bank, 270 U.S. 49, 55, recognizes the rule stated in Shively v. Bowlby and adds that the United States has refrained from making such dispositions except "in exceptional circumstances" and that disposals during the territorial period "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."

The parties recognize the principles just stated except that the Indians and those who support them question the applicability of the Holt State Bank decision because of distinguishing facts. Before Minnesota became a state in 1858, the Chippewas ceded to the United States their aboriginal right of occupancy with the reservation of an area for continued occupation. Included therein was Mud

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[23] See Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436, and Weber v. Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57, 65.

Lake which the Court found to be navigable water. Later the Indians relinquished the area to the United States. The issue was whether the United States held title to the land on which Mud Lake was located. The Court held that the lands under the lake were not disposed of by the United States before Minnesota became a state and title passed to Minnesota on admission. Although Holt State Bank was not concerned with a situation, such as we have here, involving a conveyance by the United States to the Indians, that case and the one at bar each relate to the question of whether the United States had disposed of lands underlying navigable waters before statehood. We must follow the admonition in Holt State Bank that such dispositions should not be regarded as intended in the absence of a clear showing of intent.

The United States, as amicus,[24] argues that the equal footing-implied trust doctrine has no application because of the unique character of the Cherokee and Choctaw territory under the treaties and cites Atlantic and Pacific Railroad Company v. Mingus, 165 U.S. 413, as supporting authority. In that case the issue was the validity of an act forfeiting a part of a railroad land grant. A claim of the railroad was that the forfeiture failed because the United States had not carried out its part of the bargain to extinguish certain Indian titles. The Court mentioned the Treaties of New Echota and Dancing Rabbit Creek and said that the extinguishment of the Indian title was for determination by Congress or by the executive officers of the federal government, or by voluntary acts of the Indians. Id. at 437-438. The Court quoted with approval the statement in Mackey v. Coxe, 59 U.S. (18 How.) 100, 103, that the Cherokee territory "is not a

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[24] The United States disclaims any pecuniary interest in the outcome of the cases and says that it submits its views because of "its nonpecuniary obligations to represent certain Indian interests."

foreign, but a domestic territory—a Territory which originated under our Constitution and laws."

The treaties with the Indians are not in the same category with treaties with independent foreign nations. The Supreme Court early held that English possessions in America were claimed by right of discovery rather than by right of conquest and that under international law the Indians were regarded as temporary occupiers of the soil which was disposable by the Crown.[25] The title of the Crown passed to the United States and the Indian lands were subject to disposition under the Constitution and laws of the United States. The agreements with the Indians, when ratified by Congress, became statutes of the United States. When grants were made to the Indians, the area granted remained under the jurisdiction of the United States and subject to its Constitution and laws.

In spite of provisions in Indian agreements that no state or territory would be created in certain areas,[26] states were created in the Northwest Territory and in the area covered by the Louisiana Purchase. In the situations before us, the Cherokees and Choctaws agreed to a nullification of the Treaties of New Echota and Dancing Rabbit Creek.[27] Oklahoma was admitted to the Union on an equal footing with the original states. From a practical standpoint, the equal footing principle must be recognized and maintained. There is no place in our federal system for a second-class state.

Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of

[25] See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595, and Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409.

[26] See footnote 11.

[27] See footnotes 14 and 15.

the federal title for a public purpose by an action showing a clear intent to make such divestiture. Such intent is not definitely declared in the grant. The question is whether the surrounding circumstances make that intent "very plain."[28]

The intent is said to be established by the agreement of the United States that no state or territory would be created in the area granted. The acceptance of this position would have widespread implications because, as we have seen, other states were created in areas covered by Indian treaties having similar provisions to those found in the Treaties of New Echota and Dancing Rabbit Creek. We believe that such provisions had to do with the exercise of political power rather than with property rights. The political aspects were changed by the Indians' acceptance of the nullification of the treaties. The property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments.

The Indians point out that the ownership of the riverbed is not necessary to the exercise of control over nagivation incidental to the authority of the Government under the Commerce Clause. This proves nothing. We are concerned with a property right—not with a navigational right. The recognition in the treaties of the constitutional powers of the United States,[29] if it has any effect at all, negatives intent to convey the riverbed.

Pursuant to their agreements with the United States, the Indians surrendered the areas which they occupied in the South. They reason that because they gave up the beds of navigable rivers, the United States intended that

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[28] United States v. Holt State Bank, 270 U.S. 49, 55.

[29] See Treaty of New Echota, Art. 5, 7 Stat. 478, 481, and Treaty of Dancing Rabbit Creek, Art. IV, 7 Stat. 333, 334.

they should have such riverbeds in the areas to which they were removed; and conversely they say that if they do not own the Oklahoma riverbeds, they still own the beds of the navigable rivers in the territory from which they were removed. The reasoning is unpersuasive. The Indians had an aboriginal title which was subject to the Constitution and laws of the United States. Failure to mention riverbeds does not establish an intent either to retain or relinquish title. If anything,it shows that no party had the problem in mind.

Amici Carter, et al., argue that no contemporary intent of Congress to reserve the riverbeds can be postulated because under the then existing law the concept of navigability was limited to waters affected by the rise and fall of the tides and the Arkansas was not so affected. The Supreme Court has rejected as inapplicable to this country, the English rule that the test for navigability is the ebb and flow of the tides.[30] The recognition in 1832 by Kent of the English rule[31] preceded any decision by the Supreme Court on the issue and may not be taken as authoritative or persuasive. Reliance on the January 19, 1816, act of the Missouri Territorial Legislature[32] is misplaced because it adopted the common law of England except to the extent that it was not of a "local nature" and "not repugnant to, nor inconsistent with the constitution and laws of the United States." The Supreme Court has said that the ebb and flow of the tide test is not applicable to conditions in the United

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[30] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, and Barney v. Keokuk, 94 U.S. 324, 336. The reason is that in England all navigable rivers are affected by the tide whereas in the United States that condition is not present.

[31] See Commentaries on American Law by James Kent, 2d ed., Vol. III, p. 427.

[32] The pertinent area was then in the Territory of Missouri.

States. Jones v. Soulard, 65 U.S. (24 How.) 41, deals with the ownership of accretions and is not in point.

The application of the navigability principle announced in The Daniel Ball and in Barney v. Keokuk, supra, to the situation presented does not violate any rule of stare decisis. We recognize the importance of stare decisis to decisions affecting property rights.[33] There is no showing that any federal court has ever applied the tidewater rule in determining the ownership of land underlying navigable water and, particularly, there is no factual basis for any claim that the Cherokees or Choctaws ever relied on that rule to their detriment.[34]

United States v. Rands, 389 U.S. 121, is no help to the Indians. That decision recognized the dominant navigational servitude held by the United States and rejected the claim that the United States must pay compensation for land's special value as a port site. It was not concerned with the ownership of a riverbed. It does not overrule Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436, which says that the soils underlying navigable water "were not granted by the Constitution to the

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[33] In this regard the amici Carter, et al., rely heavily on the statement in The Propeller Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458, that in overruling The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, it was not concerned with property rights. These cases dealt with admiralty jurisdiction and have no pertinence here.

[34] In Shively v. Bowlby, supra the Court applied the American rule in deciding the ownership of the Columbia River upon Oregon's entrance to the Union in 1859. In the Holt State Bank case, supra, the Court applied the same rule to the ownership of Mud Lake when Minnesota became a state in 1858.

United States, but were reserved to the several States."[35] We find nothing in the law as it was at the times of the treaties which can be taken as indicative of an intent by the United States to pass title to the riverbed of the Arkansas to the Indians.

The Indians seek comfort from the technical language of the treaties and grants. They attach significance to such phrases as "to the Arkansas River," "down the Arkansas," and "thence down the main channel of the Arkansas." We agree with Oklahoma that references to the Arkansas River are for the purpose of establishing reference points, monuments, or boundaries. They do not indicate an intent, much less a clear intent, to convey the riverbed. Reliance on the surveys is misplaced. The surveyors could not determine the intent of the United States. Donnelly v. United States, 228 U.S. 243, is not in point. Prior to the creation of the reservation there in question, California, by an act of its legislature, had excluded the Klamath River from the navigable class and the Court said that accordingly the river was not navigable in law. Id. at 262-263.

In Moore v. United States, 9 Cir., 157 F.2d 760, cert. denied 330 U.S. 827, and in United States v. Stotts, W.D. Wash., 49 F.2d 619, it was held that lands above low-water mark in tidal areas passed to Indians under treaties with the United States. In each case the court found a definite intent on the part of the United States to retain those lands and waters for the benefit of Indian fisheries and distinguished Holt State Bank, supra, on this ground. In the case before us we have no showing of any need by the Indians for the riverbed of the Arkansas

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[35] In United States v. Holt State Bank, 270 U.S. 49, 55, the Court said that "the United States early adopted and constantly has adhered to" the implied trust doctrine regarding lands under navigable waters.

and no expression of intent that it should pass to the Indians.

We recognize that an Indian treaty is to be liberally construed in favor of the Indians[36] as unlettered people understood it and as justice and reason demand when the strong assert power over those to whom they owe care and protection.[37] Another rule of construction is that in a grant by the sovereign nothing passes by implication.[38] Holt State Bank extends this rule to a situation relating to Indian lands and to the equal footing-implied trust doctrine. Although Holt State Bank did not deal with a claim presented by Indians and although the United States is not a party to this case, we believe that the rule announced in that decision must apply. It requires a clear and definite intent to convey the beds of navigable rivers which otherwise would pass to a state on admission. Such an intent is not shown by the grant of millions of acres of land which are described by perimeters. The responsibility of the United States to the new states is not less than its responsibility to the Indians.

In the final analysis the claim of the Indians rests on inference and implication. Nothing in the treaties, statutes, and conveyances establishes an intent by the United States, as trustee for states to be formed, to convey

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[36] United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116.

[37] Menominee Tribe of Indians v. United States, 391 U.S. 404, 406. The Treaty of Dancing Rabbit Creek provides, Art. XVIII, 7 Stat. 333, 336, that "in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

[38] Northern Pacific Ry. Co. v. Soderberg, 188 U.S. 526, 534, and Caldwell v. United States, 250 U.S. 14, 20.

away property held for the benefit of the new states. When Congress passed the statutes pursuant to the Treaties of New Echota and Dancing Rabbit Creek, the lands covered were undeveloped and virtually unknown. To say that Congress then intended to convey the riverbeds, which over a hundred years later would become valuable because of underlying mineral deposits, is to ignore realities.

In the view of the disposition which we make of the case it is unnecessary to consider the jurisdiction of the court over the claim of the Choctaws against the Cherokees or the validity of that claim.

Affirmed.

ORDER

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

Upon consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court be and the same is hereby affirmed.

MOTION TO RECALL MANDATE

The appellant, The Cherokee Nation or Tribe of Indians in Oklahoma, respectfully moves this Honorable Court to recall the Mandate in the above entitled action until further order of the Court on the ground and for the reason that the appellant expects and intends in good faith within the time allowed by law to apply to the Supreme Court of the United States of America a peti-

tion for review on a writ of certiorari of the decision and judgment rendered in favor of Appellees and against Appellant in the above entitled action.

WHEREFORE, Appellant prays that the Court make and enter an appropriate order herein, recalling and staying the Mandate in this action until further Order of the Court.

THE CHEROKEE NATION or Tribe of Indians in Oklahoma,

By: ANDREW WILCOXEN,
P.O. Box 1842
Muskogee, Oklahoma 74401,

Attorney for Appellant.

On application of appellant, it is ordered that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under the rules of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

CLERK'S CERTIFICATE

I, William L. Whittaker, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing to be a full, true, and complete copy of certain pleadings, record entries and proceedings

including the record on appeal, review or enforcement from the trial court or administrative agency had and filed in the United States Court of Appeals for the Tenth Circuit in the cause described on page 1 hereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this twenty-third day of January 1969.

William L. Whittaker

By /s/ Ruth H. Jacobson, d.c.
William L. Whittaker, Clerk
of the United States Court
of Appeals for the Tenth
Circuit.

Supreme Court of the United States

No. 976 ---- , *October Term, 19* 68

The Choctaw Nation and The Chickasaw Nation,

Petitioners,

v.

Oklahoma, et al.

ORDER ALLOWING CERTIORARI. Filed April 21 ---------- , 19 69

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth ---------- Circuit is granted. The case is consolidated with No. 1104 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 1104 ----- , *October Term, 19* 68

The Cherokee Nation or Tribe of Indians
in Oklahoma,

Petitioner,

v.

Oklahoma, et al.

ORDER ALLOWING CERTIORARI. Filed April 21 ---------- , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth ---------- Circuit is granted. The case is consolidated with No. 976 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.